Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Stephen P. Medeiros,

Petitioner,

v.

W. Michael Sullivan, Director of the Rhode Island Department of Environmental Management, Atlantic States Marine Fisheries Commission, and United States of America.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a person directly harmed by the federal government's commandeering of a state government in violation of the Tenth Amendment and principles of federalism is nonetheless categorically prohibited from challenging that Tenth Amendment violation.

PARTIES TO THE PROCEEDING BELOW

Frederick J. Vincent appeared as an appellee below in his capacity as interim director of the Rhode Island Department of Environmental Management ("DEM"). See Pet. App. 1a. He replaced Jan Reitsma, who appeared as a defendant in the district court and as an appellee at the commencement of the First Circuit appeal in his capacity as director of DEM. See ASMFC C.A. Br. (cover).

W. Michael Sullivan is substituted as respondent in this Court. On April 5, 2005, he was appointed as the director of DEM, replacing Frederick J. Vincent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stephen P. Medeiros respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-17a), dated December 12, 2005, is published at 431 F.3d 25. The district court's order granting respondents' motion for summary judgment (Pet. App. 18a-33a) is published at 327 F. Supp. 2d 145. On March 6, 2006, Justice Souter extended the time to file this petition to and including March 27, 2006. App. 05A811. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant statutory and regulatory provisions are reproduced in the Appendix at 34a-53a.

STATEMENT

Petitioner brought this suit to challenge a federal statute that required Rhode Island to adopt a fisheries regulation that harms petitioner's business as a commercial fisherman. Petitioner challenged the federal statute as violating the Tenth Amendment's anti-commandeering principle. The lower courts did not doubt that petitioner had been injured by the federal mandate. They nonetheless held that petitioner lacked standing because private individuals are powerless to raise such a Tenth Amendment challenge. Deeming the contrary holdings of the Seventh and Eleventh Circuits – which allow private plaintiffs to litigate such a claim – "problematic," the

First Circuit invited this Court to revisit this "complex [] issue of constitutional law," Pet. App. 17a, noting that the Court had previously granted certiorari to decide the question, but ultimately left it unresolved, *id.* 16a (citing *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003)).

1. In 1942, Congress approved an interstate compact among the Atlantic coast states "to promote the better utilization of the fisheries * * * of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries." Act of May 4, 1942, Pub. L. No. 77-539, 56 Stat. 267, 267. The compact created the Atlantic States Marine Fisheries Commission ("ASMFC" or "Commission"), which, as originally established, had no actual authority over the member states. Instead, the Commission was limited to "recommend[ing] to the governors and legislatures of the various signatory states, legislation dealing with the conservation of * * * fisheries." 56 Stat. at 268. Such recommendations took the form of interstate fishery management plans. *Ibid.*; ASMFC Rules and Regulations, art. vi, *available at* http://www.asmfc.org (visited Mar. 27, 2006). While each member state had "the opportunity to participate in" recommended fishery management plans, *id.* art. vi, § 4, the states' only affirmative duty was to contribute to the Commission's operating budget, 56 Stat. at 269.

In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act ("Act"), Pub. L. No. 103-206, 107 Stat. 2419 (codified at 16 U.S.C. 5101-08). In essence, the Act created a federal mandate that member states comply with the Commission's recommendations. The Act requires the Commission to "adopt coastal fishery management plans" and to "specify the requirements necessary for States to be in compliance with [a] plan." 16 U.S.C. 5104(a)(1). The states must then "implement and enforce the measures of such plan[s]," *id.* § 5104(b)(1), by "enact[ing] and implement[ing] laws or regulations as required to conform with the provisions

of a coastal fishery management plan and to assure compliance with such laws or regulations," *id.* § 5102(10).

The Act further requires the Commission to monitor the states' compliance with these fishery management plans; if the Commission finds that a state "has not implemented and enforced such a plan," it is required to notify the U.S. Secretaries of the Interior and Commerce. *Id.* § 5105(a)-(b). If the Secretary of Commerce finds that (i) a state "has failed to carry out its responsibility" to enact these laws, and (ii) that "the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery," then the Secretary must "declare a moratorium on fishing in the fishery in question within the waters of the noncomplying state." *Id.* § 5106(a)(1)-(2), (c)(1). Once a moratorium is in place, all "fishing for any species of fish to which the moratorium applies" is prohibited, with violators subject to both civil and criminal penalties that may include forfeiture of their vessels, gear, and cargo. *Id.* § 5106(e)-(g). The state can free itself from the moratorium only by enacting and enforcing the Commission's plan. *Id.* § 5106(c)(2).

2. Lobsters are found along much of the Atlantic coast and are especially abundant along the inshore areas from Maine to New Jersey. See ASMFC American Lobster Fact Sheet, *available at* http://www.asmfc.org (visited Mar. 22, 2006). These lobster fisheries are among the Atlantic coast's most valuable, with commercial landings in 1999 exceeding 87 million pounds, worth approximately $323 million. *Ibid.* Nearly eighty percent of the annual lobster catch is landed in state waters, which extend from the coastline to three miles offshore. *Ibid.*

The first plan for the management of the American lobster fishery was the Interstate Fishery Management Plan for American Lobster, promulgated by the Commission in the 1970s. ASFMC C.A. Br. 6. In 1997, the Commission adopted Amendment 3 to the Plan, which as relevant here restricts "fishermen using gear or methods other than traps

(non-trap fishermen) * * * to no more than 100 lobsters per day * * * up to a maximum of 500 lobsters per trip, for trips 5 days or longer." Pet. App. 52a.

To implement the Commission's new mandate, as required by the federal statute, the Rhode Island Marine Fisheries Council ("RIMFC")[1] enacted Regulation 15.18 in November 1998. The regulation, which took effect in January 1999, tracked the language of Amendment 3, see Pet. App. 53a, and brought Rhode Island into compliance with the ASMFC's management plan and the requirements of the Act.

RIMFC repealed Regulation 15.18 on June 6, 2000, however. The repeal reflected state officials' concerns that Amendment 3 provided "no meaningful conservation benefit," was "inappropriate for application in Rhode Island waters," and was "discriminatory." Pet. App. 54a-61a. Though the head of Rhode Island's Department of Environmental Management ("DEM") and the state's governor "disagreed with the strategy of falling out of compliance with the Lobster Plan and triggering the possibility of a moratorium," they "shared [RIMFC's] concerns" regarding Amendment 3's deleterious effects on Rhode Island, *id.* 60a; indeed, prompted by the quandary Amendment 3 presented for the state, the DEM Director communicated to the federal government the state's "long-standing concerns regarding state-federal relations in fisheries management." *Id.* 61a.

On October 19, 2000, the Commission found Rhode Island noncompliant with Amendment 3 and, as required by the Act, reported its finding to the Secretaries of the Interior and Commerce. To avoid a threatened moratorium on all lobstering within its waters, Rhode Island reenacted a temporary regulation by emergency rule on November 29,

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[1] RIMFC, which was responsible for regulation of all marine animal species within the state from 1981 until July 2001, became an advisory body in July 2001. See Pet. App. 22a n.2.

2000, but asked the Department of Commerce to reevaluate its position on the necessity of the Amendment. See Pet. App. 58a-61a. After finding that Rhode Island had failed to meet its obligation under the Act to permanently enact a "necessary" state law, the Secretary of Commerce published a moratorium notification in the Federal Register. 66 Fed. Reg. 13,443, 13,444 (Mar. 6, 2001). DEM then readopted its regulation on a permanent basis "to avoid imposition of [this] moratorium." Pet. App. 22a.

3. In this case, petitioner Stephen Medeiros is the plaintiff and the defendants are the United States, the Commission, and DEM. Petitioner is a resident of Rhode Island and operates a commercial fishing vessel there. Petr. C.A. App. 69. Although petitioner does not fish primarily for lobsters, he frequently catches them in his nets, particularly during the months when they are more prevalent at the bottom of the ocean and when other fish are out of season. *Id.* 91. Petitioner sells the lobsters he does catch, supplementing his other fishing income. By restricting the number of lobsters that he is permitted to catch in his nets, Amendment 3 (and, as a result, Regulation 15.18) thus places an economic burden on petitioner's livelihood. It is undisputed that, absent the challenged regulation, petitioner could and would catch and sell lobsters in excess of the regulatory limits.[2]

a. Petitioner accordingly sought a declaration that, *inter alia*, the Act violates the Tenth Amendment by requiring Rhode Island to "implement and enforce" laws not of its own choosing. Pet. App. 29a.[3] Petitioner also sought an

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[2] Indeed, on June 5, 1999, petitioner was criminally charged in Rhode Island Superior Court with landing thirty-one more lobsters than permitted under Amendment 3 and Regulation 15.18. That court dismissed the charges, finding on the facts of that case that the state would be unable to prove the charges beyond a reasonable doubt. See Petr. C.A. App. 43.

[3] Petitioner initiated the case in October 2001 by suing DEM, which removed to federal district court. The Commission was

injunction that would prohibit DEM from enforcing Amendment 3, as implemented by Regulation 15.18.

On cross-motions for summary judgment, the district court rejected respondents' argument that petitioner lacked standing because he had not demonstrated a distinct injury-in-fact. Pet. App. 29a. Noting that the courts of appeals were in "disagreement" on the issue, the court accepted respondents' contention that petitioner lacked standing to raise his Tenth Amendment claim because private individuals, the court held, are categorically precluded from seeking to enforce the limitations imposed on the federal government by the Tenth Amendment. *Id.* 23a. For that conclusion, the district court relied on this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 144 (1939) ("*TVA*"). In *TVA*, this Court – considering a Tenth Amendment challenge to the Tennessee Valley Act brought by private utility companies – had briefly noted that, "absent the states or their officers," those companies lacked "standing in this suit to raise any question" under the Tenth Amendment. Pet. App. 30a (quoting *TVA*, 306 U.S. at 144). The district court acknowledged this Court's subsequent recognition in *New York* v. *United States*, 505 U.S. 144 (1992), that "the Constitution divides authority between federal and state governments for the protection of individuals," and that when "Congress exceeds its authority relative to the States * * * the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." Pet. App. 31a-32a (quoting *New York*, 505 U.S. at 181-82) (alteration in district court opinion). However, the district court deemed that "observ[ation]" "not determinative of the issue" because "[t]he standing of a private litigant to assert a Tenth Amendment claim was not at issue" in *New York*. *Id.* 31a-32a. The district concluded that, because this Court had recently granted certiorari to consider – but declined to resolve – the

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added as an indispensable party, and the United States intervened to defend the Tenth Amendment claim. See Petr. C.A. Br. xi-xii.

very question presented in this case, see *Pierce County*, 537 U.S. at 148 n.10, it remained bound by "the principle enunciated in" *TVA*. Pet. App. 32a.

b. On appeal, the First Circuit affirmed the district court's holding that private parties such as petitioner lack standing to raise Tenth Amendment claims. Pet. App. 13a. Like the district court, the court of appeals deemed this Court's statement in *TVA* "binding precedent" having "direct application to" petitioner's case insofar as "it involved private parties attempting to assert Tenth Amendment claims, whereas *New York* did not." *Id.* 14a-15a. And while the court of appeals acknowledged the possibility that "if a State refuses to oppose an unlawful commandeering, an individual citizen is the only remaining party with an interest and incentive to vindicate that violation, and therefore the *New York* Court necessarily must have envisioned that the private citizen would have standing to bring suit on the Tenth Amendment claim," it dismissed that conclusion as only "one plausible interpretation." *Id.* 15a. Equally plausible, in the court's view, was that "the Court may simply have intended that the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." *Ibid.* However, the court ultimately concluded that it "need not determine which interpretation is more likely, but only that it is at least debatable whether, or to what extent, the *New York* decision undermines the *TVA* holding." *Id.* 15a-16a.

The court of appeals acknowledged that its decision was in conflict with the precedent of the Seventh and Eleventh Circuits, both of which have expressly held that private parties have standing to assert Tenth Amendment claims. Pet. App. 16a (citing *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (CA11 2000), and *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 702-04 (CA7 1999), cert. denied, 528 U.S. 1116 (2000)). But the court of appeals concluded

that these contrary authorities were "problematic." *Ibid.* Addressing *Gillespie*, in which the Seventh Circuit permitted a state police officer to maintain a Tenth Amendment challenge to a law restricting his ability to possess a firearm, the First Circuit questioned whether the plaintiff was actually acting on behalf of the state or as a private citizen. *Ibid.* The court of appeals was also skeptical of the Eleventh Circuit's numerous decisions granting standing to private parties, emphasizing that the first case to do so failed to discuss *TVA*. *Ibid.* "In contrast," the First Circuit observed, "many courts explicitly have held that *TVA*, until overruled, bars Tenth Amendment claims by private citizens." *Ibid.* (citing *United States* v. *Parker*, 362 F.3d 1279, 1284-85 (CA10), cert. denied, 125 S. Ct. 88 (2004); *City of Roseville* v. *Norton*, 219 F. Supp. 2d 130, 147-48 (D.D.C. 2002); *Vt. Assembly of Home Health Agencies* v. *Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998)). Ultimately, the court of appeals concluded that it could draw no further conclusions about the continued validity of *TVA*, but could only await this Court's clarification of "so complex an issue of constitutional law." *Id.* 16a-17a.

4. This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals properly recognized that only this Court can bring needed clarity and uniformity to this important and recurring question of federal law. Although consistent with the decisions of two other courts of appeals, the decision below openly conflicts with the holdings of the Seventh and Eleventh Circuits and is in substantial tension with decisions by other courts of appeals that have addressed the merits of private parties' Tenth Amendment challenges without doubting their right to bring such a claim. The conflict arises from the inconsistent signals sent by this Court's 1939 decision in *TVA* and its more recent decisions in *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997), inconsistencies that only this Court can resolve. Indeed, this Court previously granted certiorari to consider, but ultimately

did not reach, the very question presented by this petition. See *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003).[4] At oral argument in *Pierce County*, the United States urged this Court to wait to decide this "difficult question" in a case in which it is "properly raised" and adequately briefed. Tr. of Oral Arg. 25, 28-29, 537 U.S. 129 (No. 01-1229), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1229.pdf. Because the question presented was squarely decided below and is not clouded by any antecedent question, this is that case.

Certiorari is also warranted because the decision below is wrong on the merits. The Tenth Amendment is fundamentally a separation-of-powers principle, and this Court has routinely permitted private individuals to challenge federal laws on the ground that they violate the separation of powers ordained by the Constitution as a means of protecting individual liberty. There is no basis for a different result when the division of authority, and protection of liberty, is ordained by the Tenth Amendment.

I. There Is an Acknowledged and Deep Division Among the Circuits Over Private Parties' Standing to Bring Tenth Amendment Challenges.

1. The circuit conflict over the right of private parties to raise a Tenth Amendment challenge has been widely recognized. See Pet. App. 16a-17a (acknowledging split); *United States* v. *Parker*, 362 F.3d 1279, 1284-85 (CA10) (same), cert. denied, 125 S. Ct. 88 (2004); *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700 n.3 (CA7 1999) (same), cert. denied, 528 U.S. 1116 (2000).

The First Circuit held in this case that violations of the Tenth Amendment are immune from challenge by private parties. Pet. App. 13a. Absent further clarification from this

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[4] As far as petitioner can determine, the petition in *Pierce County* was the only petition since the circuit split developed to raise the private-party standing issue.

Court, the court of appeals deemed itself bound by *TVA* to reach that result. *Id.* 14a. The Tenth and D.C. Circuits have reached the same result, albeit for somewhat different reasons. In *Mountain States Legal Foundation* v. *Costle*, 630 F.2d 754, 761-72 (1980), cert. denied, 450 U.S. 1050 (1981), the Tenth Circuit held that a non-profit corporation and various individual state legislators could not challenge the EPA's efforts to impose various air quality rules on the State of Colorado. Explaining that only the Colorado Attorney General was authorized to represent the state in legal proceedings, and therefore the individual legislators could not have been acting on the state's behalf, *id.* at 771, the Tenth Circuit declared that "[o]nly the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment," *id.* at 761. The Tenth Circuit subsequently reaffirmed its position in *Parker*, 362 F.3d at 1284-85 & n.4, in which it *sua sponte* held that it could not reach the merits of an individual's claim that the federal government's prosecution of him for violations of state gun laws violated the Tenth Amendment. *Id.* at 1285. While recognizing that other circuits had since resolved the standing issue differently, *id.* at 1284 n.4 (citing *Gillespie*), the panel considered itself bound by the circuit's prior precedent holding that private parties lack standing to bring Tenth Amendment claims, *id.* at 1284-85 & n.4.

The D.C. Circuit has strongly-suggested that it too would deny private parties standing to raise Tenth Amendment claims. In *Lomont* v. *O'Neill*, 285 F.3d 9, 13 n.3 (2002), that court considered a Tenth Amendment challenge to a federal firearms statute. Although the court ultimately concluded that it did not need to decide the issue definitively,[5] it described

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[5] The court was able to avoid the standing question because two of the plaintiffs had standing to raise a Tenth Amendment challenge by virtue of the fact that they appeared in their capacities as the chief law enforcement officials of their respective jurisdictions. 285 F.3d at 14. Accordingly, the court decided the

the question "whether the private plaintiffs have standing" as "uncertain." *Ibid.* The D.C. Circuit emphasized this Court's statement in *TVA* that the private utilities lacked standing, as well as precedent holding that this Court alone has the prerogative to overrule its own decisions. *Ibid.* (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The U.S. District Court for the District of Columbia has since construed *Lomont* as circuit precedent compelling it to deny private parties standing to assert Tenth Amendment claims. See, *e.g.*, *City of Roseville* v. *Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002), aff'd, 348 F.3d 1020 (CADC 2003), cert. denied sub nom. *Citizens for Safer Communities* v. *Norton*, 541 U.S. 974 (2004).

Likewise, the Fifth Circuit has expressed its view that private-party standing to raise Tenth Amendment claims is "doubtful," *United States* v. *Brockway*, 769 F.2d 263, 265 (1985), and it subsequently summarily affirmed a district court decision denying a private party standing to raise a Tenth Amendment challenge. See *Gaubert* v. *Denton*, No. 98-2947, 1999 U.S. Dist. LEXIS 8207, at **7-14 (E.D. La. May 28, 1999), aff'd, 210 F.3d 368 (CA5 2000) (table).

In stark contrast, two circuits and one state supreme court have squarely held that private parties do have standing to bring Tenth Amendment challenges and thus would have allowed petitioner's claim to proceed. The Eleventh Circuit has repeatedly reached that conclusion. In *Atlanta Gas Light Co.* v. *United States Dep't of Energy*, 666 F.2d 1359, 1368-69, cert. denied, 459 U.S. 836 (1982), that court allowed several energy companies to pursue their claim that the Fuel Use Act and its regulations violated the Tenth Amendment by displacing state sovereignty. While the Eleventh Circuit "initially express[ed] * * * uncertainty about whether the petitioners ha[d] standing to raise" the Tenth Amendment

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Tenth Amendment question on the merits and upheld the statute. *Id.* at 11-15.

issue when none of them were either states or government officials, it reasoned that this Court had repeatedly granted standing by implication when considering the merits of private parties' Tenth Amendment claims. *Id.* at 1368 n.16 (citing *Helvering* v. *Davis*, 301 U.S. 619, 637, 640 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 573, 585 (1937)). Moreover, although this Court had "intimated" in *Flast* v. *Cohen*, 392 U.S. 83, 105 (1968), that "under its nexus requirement * * * a private party could not have standing to assert the interests of the states as protected by the Tenth Amendment," the Eleventh Circuit regarded this Court's decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as having "expressly limited" the *Flast* nexus requirement to taxpayer suits, *Atlanta Gas*, 666 F.2d at 1368 n.16.

The Eleventh Circuit reaffirmed this holding in *Seniors Civil Liberties Ass'n, Inc.* v. *Kemp*, 965 F.2d 1030, 1034 n.6 (1992), and again in *Dillard* v. *Baldwin County Commissioners*, 225 F.3d 1271, 1275-77 (2000). In *Kemp*, the court considered a claim that the Fair Housing Act violated the Tenth Amendment. 965 F.2d at 1033, 1034. Citing *Atlanta Gas* for the proposition that, "if injury or threatened injury occurs, private parties have standing to assert Tenth Amendment challenges," the court held that the parties had standing. *Id.* at 1036 n.6. In *Dillard* – a case involving a challenge to a lower court's alteration of county voting districts – the court rejected the county commissioners' argument that "private plaintiffs cannot have standing to assert Tenth Amendment claims except in circumstances where they establish some particularized injury which is redressable under some other constitutional or statutory provision." 225 F.3d at 1276. The court of appeals explained, "our case precedent makes clear that * * * to establish standing to bring a Tenth Amendment claim, just as for any

other claim, the plaintiff must show that it suffered an injury in fact caused by the challenged action." *Id.* at 1277.[6]

The Seventh Circuit also holds that private parties have standing to bring Tenth Amendment challenges. In *Gillespie*, a police officer contended that a provision in the Gun Control Act that precluded him from carrying a weapon because he had previously been convicted of domestic violence violated the Tenth Amendment. 185 F.3d at 697-700. The federal prohibition, Gillespie contended, effectively commandeered state and local governments by preventing them from hiring people in his position. *Id.* at 700, 708. The Seventh Circuit held that Gillespie had standing to pursue that claim. The discussion of standing in *TVA*, the court of appeals concluded, was a mere "observ[ation] in passing," *id.* at 700, and not a binding holding, particularly because this Court had significantly lowered standing barriers since *TVA* was decided, *ibid.* (citing *United States* v. *Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring)). Moreover, the Seventh Circuit concluded, this Court's subsequent decision in *New York* made clear that the plaintiff was actually asserting his own rights. *Id.* at 703-04. Because Gillespie otherwise met traditional standing requirements, the Seventh Circuit held that he had standing as a private individual to raise his Tenth Amendment objection. *Ibid.*

The First Circuit's suggestion in this case that its ruling could be squared with the Seventh Circuit's *Gillespie* decision

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[6] The decision below wrongly suggests that the Eleventh Circuit has failed to take into account this Court's decision in *TVA*. Pet. App. 16a. Although the Eleventh Circuit's first decision on the question, *Atlanta Gas*, did not discuss *TVA*, the court subsequently reaffirmed its holding in *Dillard*, in which Judge Barkett's concurrence explicitly expressed concern about a possible conflict with *TVA*. See *Dillard*, 225 F.3d at 1275-77; *id.* at 1283 n.1 (Barkett, J., concurring specially). However, even Judge Barkett declined to characterize *TVA*'s standing discussion as a holding, describing it instead as an "observ[ation] in passing." *Ibid.*

is meritless. The First Circuit suggested that Gillespie was accorded standing because he was invoking the interests of the state in his capacity as a public official (*i.e.*, a police officer). Pet. App. 16a. In fact, the Seventh Circuit repeatedly made clear both that Gillespie was "asserting his own rights," 185 F.3d at 703, and that he had standing as a private party, *id.* at 700-04. Any claim that Gillespie was acting on the state's behalf is further belied by the fact that the City of Indianapolis – the very entity whose sovereignty was allegedly violated by the federal law at issue – was a party defendant and explicitly argued that the Tenth Amendment had not been violated. See *id.* at 700. Moreover, the *Gillespie* court itself acknowledged that its ruling conflicted with decisions denying standing, including the Tenth Circuit's decision in *Costle*. See *id.* at 700 n.3. In turn, both the Tenth and D.C. Circuits have noted the conflict between their precedent and *Gillespie*. See *Lomont*, 285 F.3d at 13 n.3; *Parker*, 362 F.3d at 1284 & n.4.

The Washington Supreme Court would also allow petitioner's Tenth Amendment claim to proceed. In *Guillen* v. *Pierce County*, 31 P.3d 628 (Wash. 2001), that court noted that several other courts had recognized private-party standing in Tenth Amendment challenges. See *id.* at 730-31 (citing *Kemp* and *Atlanta Gas*). Those rulings, combined with this Court's statements in *New York*, *id.* at 731, led the Washington court to conclude that "private respondents are not deprived of standing to challenge the constitutionality of a federal law on federalism grounds merely because state officials oppose the challenge," *ibid.* Though this Court later reversed the judgment of the Washington Supreme Court, it did so on other grounds and specifically reserved judgment on the standing question. See *Pierce County*, 537 U.S. at 147-48 & n.10.

The First Circuit's holding is also in considerable tension with decisions of three other circuits – the Second, Fourth,

and Eighth – which have consistently reached the merits of private parties' Tenth Amendment claims.[7] Most of these cases were decided subsequent to this Court's holding in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), that, because standing is jurisdictional, a federal court may not reach the merits of a claim until it first determines whether the party asserting the claim had standing. See *id.* at 101-02.[8]

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[7] Second Circuit: see *United States* v. *Milstein*, 401 F.3d 53, 68-69 (2005); *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 96 (2000); *United States* v. *A-Abras, Inc.*, 185 F.3d 26, 32-34 (1999); *United States* v. *Von Foelkel*, 136 F.3d 339, 341 (1998).

Fourth Circuit: see *Metrolina Family Practice Group* v. *Sullivan*, No. 90-2320, 1991 U.S. App. LEXIS 4727, at **2-3 (Mar. 25, 1991) (per curiam) (unpublished) (expressly holding that private individuals have standing to raise Tenth Amendment challenge); see also *Freilich* v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205, 213-14 (2002) (deciding private Tenth Amendment claim); *United States* v. *Nathan*, 202 F.3d 230, 233 (2000) (same); *United States* v. *Bostic*, 168 F.3d 718, 723-24 (1999) (same).

Eighth Circuit: see *United States* v. *Lewis*, 236 F.3d 948, 950 (2001); *United States* v. *Wright*, 128 F.3d 1274, 1276 (1997); *United States* v. *Crawford*, 115 F.3d 1397, 1401-02 (1997).

[8] Decisions in the Ninth Circuit are inconsistent. In at least one case, the court has expressed doubts regarding the availability of private-party standing. See *Nance* v. *EPA*, 645 F.2d 701, 716 (1981) ("insofar as the tenth amendment is designed to protect the interest of the states qua states, [private party standing] may be seriously questioned"); see also *Artichoke Joe's Cal. Grand Casino* v. *Norton*, 278 F. Supp. 2d 1174, 1181 (E.D. Cal. 2003) (citing *Nance*, 645 F.2d at 716, in support of its conclusion that private parties lacked standing). On the other hand, the Ninth Circuit has repeatedly reached the merits of such claims. See *United States* v. *Geiger*, 263 F.3d 1034, 1040-41 (2001); *United States* v. *Jones*, 231 F.3d 508, 515 (2000); *FTC* v. *MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (1998); *United States* v. *Gordon*, 974 F.2d 1110, 1115 (1992).

2. Certiorari is also warranted because the circuit split is longstanding and entrenched. This conflict has existed for over twenty-three years, since the Eleventh Circuit issued its decision in *Atlanta Gas* in 1982 in conflict with the Tenth Circuit's holding in *Costle*. Since that time, the conflict has become considerably more entrenched. In *Parker*, for example, the Tenth Circuit could have reconsidered its position denying standing in light of *New York* and the Seventh Circuit's opinion in *Gillespie*, but instead chose to reaffirm its earlier position. 362 F.3d at 1284-85. Similarly, in *Lomont* the D.C. Circuit cited, but implicitly rejected, *Gillespie*'s reasoning. See 285 F.3d at 13 n.3. More generally, it is unlikely that any of those courts that found *TVA*'s statement dispositive will reconsider their positions. See *Rodriguez de Quijas*, 490 U.S. at 484 (holding that lower courts are bound to apply this Court's precedents until this Court chooses to overrule them).

It is similarly unlikely that any of the circuits recognizing private-party standing will reconsider their position. In *Gillespie*, the Seventh Circuit expressly acknowledged that its holding conflicted with that of other circuits. See 185 F.3d at 700 n.3. The Eleventh Circuit has twice reaffirmed its position in *Atlanta Gas*, deeming it binding precedent even in the face of "doubts" as to private-party standing. *Kemp*, 965 F.2d at 1034 n.6; see *Dillard*, 225 F.3d at 1277; see also Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1079 (2000) (describing *Atlanta Gas* as having "locked both the court of appeals for that circuit and its district courts" into granting private-party standing).

4. This circuit split is untenable because its result is that private parties in some circuits may raise Tenth Amendment challenges to federal laws, while those in other circuits may not. In this case, for example, because plaintiffs along the Atlantic seaboard – for instance, those in Rhode Island versus those in Florida – are subject to inconsistent private-party standing rules, a Florida fisherman has standing to challenge

the Act's commandeering regime, but petitioner does not. Given the direct harm to petitioner in this case, petitioner should not be deprived of the opportunity enjoyed by Florida fisherman to challenge the Act.

5. This Court's intervention is further required because the split among the courts of appeals stems in large part from divergent interpretations of this Court's statement in *TVA* that the private utilities in that case, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment." 306 U.S. at 144 (citing *Georgia Power Co.* v. *Tennessee Valley Authority*, 14 F. Supp. 673, 676 (N.D. Ga. 1936)). Because the circuits are mindful that "this Court has the prerogative of overruling its own decisions," *Rodriguez de Quijas*, 490 U.S. at 484, their interpretations of *TVA* often foreclose any further analysis of Tenth Amendment standing.

For example, some circuits – including the First Circuit in this case, see Pet. App. 13a – have interpreted this Court's statement in *TVA* as a far-reaching holding that individuals never have standing to invoke the Tenth Amendment. Rejecting petitioner's assertion that the sentence was dicta, the First Circuit construed *TVA* as "dismiss[ing] the Tenth Amendment claim after analyzing both the standing issue and the merits," such that "the former holding is an alternative ground, rather than obiter dictum." *Ibid.* Likewise, the D.C. Circuit has strongly suggested that *TVA* represents an across-the-board holding that individuals can never raise Tenth Amendment challenges. *Lomont*, 285 F.3d at 14 n.3.

Other circuits have interpreted *TVA* quite differently. In *Gillespie*, the Seventh Circuit characterized *TVA*'s discussion of Tenth Amendment standing as an "observ[ation] in passing" rather than an explicit holding. 185 F.3d at 700. The Eleventh Circuit, which has consistently permitted private parties to maintain Tenth Amendment challenges for over two decades, has accorded so little weight to *TVA* that it has never cited it in a majority opinion, even after a

concurring judge specifically raised the issue. See *Dillard*, 225 F.3d at 1275-77 & n.2, 1281; *id.* at 1283 n.1 (Barkett, J., concurring specially); *Seniors Civil Liberties Ass'n*, 965 F.2d at 1034 n.6; *Atlanta Gas*, 666 F.2d at 1368 n.16. Nor have those circuits that have simply assumed Tenth Amendment standing explained their interpretation of *TVA*. See, *e.g.*, cases cited *supra* note 7.

II. The Question Presented Is Important and Recurs Frequently.

As this Court has recognized, delineating the boundaries between federal and state power involves "questions of 'great importance and delicacy.'" *New York*, 505 U.S. at 155 (quoting *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816)). Precisely because a central concern of this Court's anti-commandeering jurisprudence is to ensure that lines of political accountability are not blurred, see *New York*, 505 U.S. at 168-69, the question of who can enforce the Tenth Amendment's principles when state or local governments acquiesce in allegedly unconstitutional federal regimes is of central importance.

Tenth Amendment challenges to a broad spectrum of federal statutes arise frequently in the lower courts. See, *e.g.*, *Frank* v. *United States*, 129 F.3d 273, 275 (CA2 1997) (Brady Handgun Violence Prevention Act of 1993); *Petersburg Cellular Pshp.* v. *Bd. of Supervisors*, 205 F.3d 688, 691 (CA4 2000) (Telecommunications Act of 1996); *Condon* v. *Reno*, 155 F.3d 453, 455-56 (CA4 1998) (Driver's Privacy Protection Act), rev'd, 528 U.S. 141, 148 (2000); *City of Abilene* v. *EPA*, 325 F.3d 657, 659 (CA5 2003) (Clean Water Act); *Ass'n of Cmty. Orgs. for Reform Now* v. *Edwards*, 81 F.3d 1387, 1388 (CA5 1996) (Lead Contamination Control Act of 1988); *Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 834 (CA6 1997) (National Voter Registration Act of 1993); *Bd. of Natural Res.* v. *Brown*, 992 F.2d 937, 940-41 (CA9 1993) (Forest Resources Conservation and Shortage Relief Act).

The question presented thus is inevitably a recurring one, as federal courts must determine standing before reaching the merits of a party's Tenth Amendment claim. See *Steel Co.*, 523 U.S. at 101-02. Accordingly, it is unsurprising that the question presented has not only been closely considered in five circuits (see *supra* at 9-13), but also is the subject of frequent litigation in district courts.[9]

The frequency and diversity of such private Tenth Amendment challenges illustrates the importance of the question presented and the pressing need for guidance from this Court. Indeed, this Court recognized the need to decide this question three years ago, granting certiorari on the same question in *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). This Court ultimately did not reach the question in that case, see *id.* at 148 n.10, and nothing since then has obviated the need for this Court's intervention. Moreover, this case presents the ideal vehicle for deciding the question, as the only question presented is the threshold standing question.

III. Private Parties Have Standing to Raise Tenth Amendment Challenges to Federal Statutes.

Certiorari is also warranted because the decision below is wrong on the merits. As the Seventh Circuit has recognized, permitting private parties to bring Tenth Amendment claims helps to protect the individual liberty secured by that constitutional provision. See *Gillespie*, 185 F.3d at 703. Indeed, this Court has squarely recognized that the Constitution protects state sovereignty not only for the benefit of states, but rather to secure the liberty that flows from the diffusion of power. As with other violations of the

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[9] See, *e.g.*, *Velazquez* v. *Legal Services Corp.*, 349 F. Supp. 2d 566, 581 (E.D.N.Y. 2004); *Artichoke Joe's Cal. Grand Casino*, 278 F. Supp. 2d at 1181; *Vt. Assembly of Home Health Agencies, Inc.* v. *Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998); *Gilliard* v. *Kirk*, 633 F. Supp. 1529, 1549 (W.D.N.C. 1986), rev'd on other grounds sub nom. *Bowen* v. *Gilliard*, 483 U.S. 587 (1987).

Constitution's structural plan, private parties must have standing to correct for federal encroachment on state sovereignty, especially when the encroached-upon state has acquiesced in the violation. In such cases – as this Court recognized in *New York* v. *United States*, see 505 U.S. at 182-83 – policing the constitutional plan cannot be left to the political process, because the violation itself is a corruption of that very process. Moreover, because the anti-commandeering principle arises in part from the constitutional guarantee of the separation of powers, it must be the case that individuals can invoke it. To be sure, nothing about Tenth Amendment claims relaxes the general constitutional requirements for standing, but in cases, such as petitioner's, in which those requirements are met, the Tenth Amendment imposes no additional barrier.

A. There Is No Basis For Imposing Additional Standing Requirements on Private Parties Who Seek to Challenge Federal Statutes on Tenth Amendment Grounds.

The court of appeals did not doubt that petitioner satisfied the traditional requirements of Article III standing. Petitioner easily satisfies those requirements, as would many other Tenth Amendment plaintiffs who have suffered particularized, redressable injuries as a result of federal commandeering of state or local governments. See *infra* at 25-28. Instead, the court of appeals erected a distinct standing barrier based on its view that the Tenth Amendment is directed entirely at protecting the prerogatives of states rather than the interests of individuals. That view of the Tenth Amendment, and the conclusion the First Circuit drew from it, is incorrect.

1. In *New York*, this Court invalidated as contrary to the Tenth Amendment a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that directed states to choose between the unconstitutional alternatives of either taking title to all radioactive waste generated within the state

or enacting a federally mandated state regulatory program. 505 U.S. at 174-75. This Court reasoned that each measure, in and of itself, constituted federal commandeering of state governmental machinery. The first option was "no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* at 175. The second option – "regulating pursuant to Congress' direction" – presented an unconstitutional "command to state governments to implement legislation enacted by Congress." *Id.* at 175-76.

Although New York officials had supported enactment of the federal statute, this Court nonetheless deemed the law "an unconstitutional infringement of state sovereignty," 505 U.S. at 181, explaining that

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. *To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.* State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from diffusion of sovereign power." * * * [T]he departure from the constitutional plan *cannot be ratified by the "consent" of state officials.*

Id. at 181-82 (citation omitted) (emphasis added). To further elucidate the point, the Court drew an analogy to separation-of-powers cases such as *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *INS* v. *Chadha*, 462 U.S. 919 (1983), which struck down measures that violated the Constitution's structural plan even though the "encroached-upon" branch had approved the infringement. 505 U.S. at 182. The political process, the Court explained, could not be relied upon to police such boundaries:

> [T]he facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. * * * The interests of public officials * * * may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

Id. at 182-83.

In light of these risks, and the basic purpose of the Constitution's division of government powers, it is unsurprising that this Court has repeatedly allowed private individuals to challenge federal legislation on the ground that it violates separation-of-powers principles. For example, in *Chadha*, this Court held that an individual has standing to mount a separation-of-powers challenge to a federal statute, even though "his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests." 462 U.S. at 935-36. Similarly in *Clinton* v. *City of New York*, 524 U.S. 417, 431 (1998), this Court rejected the claim that private health care providers were the wrong parties to challenge the line-item veto as violating separation-of-powers principles. See also *Buckley*, 424 U.S. at 113-18 (holding that individuals could challenge the appointment of members of the Federal Election Commission on separation-of-powers grounds). In many other separation-of-powers challenges, this Court has simply assumed the standing of individuals without discussion. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457 (2001); *Plaut* v. *Spendthrift Farm*, 514 U.S. 211 (1995); *Mistretta* v. *United States*, 488 U.S. 361 (1989); *Clinton* v. *City of New York*, 524 U.S. 417 (1998).

There is no basis for a different result when a private plaintiff challenges a federal statute as violating the constitutionally ordained separation of powers between the

state and federal governments. To secure the "protection of individuals" guaranteed by the Tenth Amendment, it follows *a fortiori* that individuals must have standing to challenge encroachments upon state sovereignty. *Gillespie*, 185 F.3d at 703. In both *Buckley* and *Chadha*, for instance, private enforcement was necessary precisely because the constitutionally separated entities had consented to the commingling of their powers. See *New York*, 505 U.S. at 182 (citing *Buckley*, 424 U.S. at 118-37, and *Chadha*, 462 U.S. at 944-59). If private parties cannot bring Tenth Amendment claims in the face of such state acquiescence, then the Constitution's vertical separation of powers will constitute "'a mere parchment delineation.'" *Morrison* v. *Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

2. The decision below suggests that even if a state refuses to pursue a valid Tenth Amendment claim, private-party standing is unnecessary because "the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." Pet. App. 15a. But states may have a variety of reasons for acquiescing in unconstitutional commandeering, and for failing to join private-party litigation once it has commenced:

> They may want to conserve resources, or they simply may not find the legislation sufficiently intrusive to warrant a constitutional challenge. Alternatively, state officials may intentionally elect to enforce potentially unconstitutional regulations, *either to avoid antagonizing the federal government*, or because the officials approve of the legislation, but do not want to face the political ramifications of enacting the statutory scheme themselves.

Gershengorn, *supra*, at 1066-67 (emphasis added). Moreover, as this Court explained in *New York*, separation-of-powers violations often corrupt the very political process

through which the First Circuit would have individuals seek a remedy. See 505 U.S. at 182-83 ("powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests").

Here, Rhode Island officials expressed repeated doubts about the fairness and efficacy of the congressionally mandated Regulation 15.18, Pet. App. 54a-61a, which was enacted only after the federal government threatened an absolute ban on Rhode Island's lobster trade. Faced with the prospect of such a punishment, it is no wonder the state would consent to commandeering. Moreover, because Rhode Island cannot single-handedly change Commission policy, it may be hesitant to challenge the Commission for fear of later reprisal through promulgation of additional policies that similarly harm Rhode Island. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 118-21 (2001) (explaining why "some states [would] seek to use federal power as an instrument for imposing their preferences on other states"). In such a setting, petitioner cannot rely on the political process to secure redress of his grievance; individual access to the courts is necessary so that the judiciary can "play[] a supporting role by enforcing the basic rules of political competition." *Id.* at 130.

In sum, "the political process offers legislators myriad incentives to disregard the impact of their actions on our federal structure." Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 886 (2006). In such situations, individuals must have standing to bring constitutional challenges and must have available redress for the unconstitutional scheme that impinges on their liberty.[10]

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[10] Indeed, the Court often steps in even when political safeguards *are* available. Thus, a further "problem with the political safeguards argument is its failure to explain * * * the many instances in which courts engage in judicial review despite the

3. Nothing in this Court's decision in *TVA* compels a contrary result. Rather, the focus of the Court's opinion in *TVA* is squarely on the merits of the utility companies' Tenth Amendment claim. Only after determining that no violation of the Tenth Amendment exists does this Court make its "observ[ation] in passing," see *Gillespie*, 185 F.3d at 700, that "there is no objection to the Authority's operations by the states, and, if this were not so, the [utilities], absent the states or their officers, have no standing in this suit to raise any question under the amendment," 306 U.S. at 144. Indeed, in subsequent cases, this Court has not considered *TVA*'s standing discussion as binding precedent. In the sentence immediately following its discussion in *TVA* of Tenth Amendment standing, this Court held that individuals lack standing under the Ninth Amendment. See *ibid.* Since then, however, this Court has both found individual rights arising out of the Ninth Amendment, see *Griswold* v. *Connecticut*, 381 U.S. 479, 484 (1965), and permitted individuals to maintain Ninth Amendment challenges, see, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 596, 601-04 (1988) (allowing a constitutional challenge based in part on the Ninth Amendment for wrongful termination of CIA employee), without recognizing any standing limitation imposed by *TVA*.

B. Petitioner and Other Tenth Amendment Claimants Who Show Particularized, Redressable Injuries Traceable to Federal Statutes That Commandeer State or Local Governments Satisfy the Standing Requirements of Article III and Accordingly May Maintain Their Suits.

In the decision below, the First Circuit addressed only the purely legal question whether private citizens ever have standing to bring Tenth Amendment challenges. Thus, if this

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theoretical availability of political protections for the values in question." Baker & Young, *supra*, at 128-33.

Court were to grant certiorari, it need not address whether petitioner himself has Article III standing to pursue his challenge to the Act. That question could be decided by the First Circuit on remand, if necessary. However, it is beyond cavil that both petitioner specifically and many other plaintiffs who raise claims under the Tenth Amendment can show (1) an injury-in-fact (2) that is fairly traceable to the defendant's conduct and (3) that is likely to be redressed by a favorable decision, as required by this Court's constitutional standing jurisprudence, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Injury-in-Fact. It is unquestionable that – as the trial court found, see Pet. App. 29a – petitioner has suffered an injury-in-fact. It is equally apparent that an entire class of similarly situated individuals – those sanctioned or threatened with sanction under laws that are the result of unconstitutional commandeering – suffer injuries-in-fact. When an individual is the object of government action, the injury-in-fact requirement is satisfied. *Lujan*, 504 U.S. at 561-62. Such governmental action is the polar opposite of the type of generalized grievance that the Court has found insufficient for standing in other cases. See, *e.g.*, *id.* at 563-67 (damage to environment in foreign country); *United States* v. *Richardson*, 418 U.S. 166, 167-68, 179-80 (1974) (lack of information about government expenditures).

Traceability. Plaintiffs in Tenth Amendment challenges also demonstrate "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. First, in the case of executive commandeering, traceability presents absolutely no obstacle: the challenged statute "compel[s] the States to implement" federal law at the expense of their citizens. *Printz*, 521 U.S. at 925. There is thus a "'direct' relationship between the alleged injury and the claim sought to be adjudicated." Nor is traceability difficult to demonstrate for legislative commandeering, despite the United States's contention that state laws like the one at issue here are the result of "the State's independent policy." U.S. C.A. Br. 30.

Indeed, this Court roundly rejected an analogous argument in *FEC* v. *Akins*, 524 U.S. 11 (1998), in which it held that a group of voters could challenge the FEC's determination that a certain organization was not a "political committee" within the meaning of the Federal Election Campaign Act of 1971. *Id.* at 13-14. In so holding, this Court explained that the voters' injury was fairly traceable "even though the FEC might reach the same result exercising its discretionary powers lawfully." *Id* at 25. Indeed, Tenth Amendment claims present an even easier standing analysis than *Akins* because, unlike in *Akins*, the allegedly illegal action and the discretionary choice are vested in *different* actors. Moreover, those cases in which this Court has deemed the traceability requirement not to be satisfied involved attenuated causal connections that depended on the uncertain reaction of individuals to altered tax obligations or criminal punishment – a far cry from coercion via a threatened moratorium. See *Allen* v. *Wright*, 468 U.S. 737, 757-59 (1984); *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617-18 (1973).

Redressability. Finally, redressability poses no barrier to individuals' vindication of Tenth Amendment principles. Any claim of executive commandeering under the Tenth Amendment would undisputedly be redressable: the individual would not be required to comply with the state regulation adopted pursuant to the unconstitutional federal mandate. Similarly, invalidation of a federal law would preclude enforcement of that law against a plaintiff by state executive officials.[11]

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[11] Respondents have previously argued that the same is not true here because the invalidation of the federal law commandeering a state legislature would not immediately result in the invalidation of the relevant state law. See ASFMC C.A. Br. 27. But that was also true in *New York*. In that case, the State of New York was free to retain the statute it had passed to comply with the challenged federal statute, and the state officials litigating the case

In any event, there is no genuine redressability problem in this or similar cases. Invalidation of the federal statute will restore petitioner's right to be subject only to such restrictions as his state legislature deems it in the public interest to impose. Cf. *New York*, 505 U.S. at 168 (noting that a central vice of commandeering is interference with "the accountability of both state and federal officials"). In this respect, Tenth Amendment claims are closely analogous to the equal protection claim this Court considered in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). There, in the context of a university affirmative action program, this Court held that although a favorable outcome could not *guarantee* the plaintiff's admission, the fact that it gave him a fair opportunity to compete was sufficient to satisfy the redressabiliity requirement. *Id.* at 280 n.14.

Second, there is a substantial likelihood that, if petitioner were to prevail, the state would in fact repeal this law. Compare *supra* at 4-5 (describing Rhode Island's resistance to enacting and enforcing Amendment 3) with *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 506 (1975) (no redressability when "the record is devoid of *any indication* that * * * were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners") (emphasis added) and *Linda R. S.*, 410 U.S. at 618 (no redressability when "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed *only speculative*") (emphasis added). Likelihood, as opposed to certainty, is all that is needed under *Lujan*'s redressability requirement. 504 U.S. at 560.

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on behalf of the state (not to mention the plaintiff counties) lacked the power to repeal those statutes if the suit was successful. See 505 U.S. at 154. Indeed, accepting respondents' construction of the redressability requirement would effectively preclude almost all challenges to legislative commandeering, including not only those by private parties but also those by most public officials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 2006

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1841

STEPHEN P. MEDEIROS
Plaintiff-Appellant

v.

FREDERICK J. VINCENT, INTERIM DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, AND ATLANTIC STATES MARINE FISHERIES COMMISSION
Defendants-Appellees

and

UNITED STATES OF AMERICA
Intervenor-Appellee

Heard, March 9, 2005
Decided, December 12, 2005

COUNSEL: Robert J. Caron for appellant.

Paul A. Lenzini, with whom Gary Powers, Department of Environmental Management, and Terence Tierney, Department of Attorney General, were on brief for appellees.

R. Justin Smith, Environmental and Natural Resources Division, U.S. Department of Justice, with whom Thomas L. Sansonetti, Assistant Attorney General, Andrew Mergen, and John A. Bryson, U.S. Department of Justice, were on brief for intervenor, appellee.

JUDGES: Before Boudin, Chief Circuit Judge, Campbell and Cyr, Senior Circuit Judges.

OPINION

CYR, Senior Circuit Judge. Stephen P. Medeiros appeals from a district court order dismissing the complaint he filed against the Rhode Island Department of Environmental Management (DEM), the Atlantic States Marine Fisheries Commission (ASMFC), and the United States, challenging the constitutionality of a DEM regulation restricting the number of lobsters which may be harvested by methods other than lobster traps. We affirm the district court order.

I. BACKGROUND

In 1942, with congressional approval, fifteen Atlantic coast states, as well as the District of Columbia, entered into a compact pursuant to which the signatories would exercise joint regulatory oversight of their fisheries (viz., the area within three miles of their respective shorelines), primarily through the development of interstate fishery management plans ("IFMPs"). Each signatory is represented on the Atlantic States Marine Fisheries Commission (ASMFC). 16 U.S.C. § 5102(3).

Until 1993, the decision to participate in any IFMP was entirely voluntary. As compliance was spotty, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101-5108 (1993) ("ACFCMA"), which permits the ASMFC (i) to identify which IFMP terms it considers "necessary," *id.* § 5104(a)(1), and (ii) to require that all member states adopt and comply with these terms. *Id.* § 5101(a)(4) ("The responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission. It is the responsibility of the Federal Government to support such cooperative interstate management of coastal fishery resources."). Should a member refuse to comply, the ASMFC may contact the Secretary of Commerce, *id.* § 5105(b), who makes a plenary determination as to whether (i) the particular IFMP term is indeed

"necessary," and (ii) the member state is in noncompliance. *Id.* § 5106(a). Should the Secretary determine that the member state is not complying with an essential term, a moratorium on fishing may be imposed in the offending member state's coastal waters. *Id.* § 5106(c).

Approximately four-fifths of all Atlantic lobsters are harvested within the territorial waters of the Atlantic states (viz., within three miles of the shoreline), and an even greater percentage by means of lobster traps. A small percentage - for example, in Rhode Island, 1.62 percent – is harvested by trawling and netting. In December 1997, ASMFC promulgated an IFMP containing Amendment 3, after acquiring evidence suggesting that, despite years of heavy regulatory oversight, the Atlantic lobster population was still being overfished.[1] "Overfishing" is defined as "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." *Id.* § 1802(29). Specifically, ASMFC determined that (i) ninety percent of recently harvested lobsters were young "recruits" which had just molted into the minimum legal size permitting their capture, and (ii) the loss of a population of more mature lobsters had resulted in a drastic diminution in lobster-egg production.

Thus, Amendment 3 promulgated a variety of "necessary" measures to ward off an impending catastrophic collapse of the Atlantic lobster stock. As concerns harvesting by lobster trap, Amendment 3 reduced the number of traps allowed on a vessel, as well as the trap capacity and the size of the trap vents designed to allow smaller lobsters to escape. With respect to non-trap lobstering methods, such as trawling and netting, Amendment 3 limited the daily harvest of

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[1] As the history of Atlantic lobster regulation is complex, we confine the present discussion to the facts most material to this appeal. A more comprehensive historical overview may be found in *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 112-14 (1st Cir. 2002).

lobsters to 100 per vessel, or 500 for vessels undertaking fishing expeditions of five days or more. The Rhode Island Marine Fisheries Council (RIMFC) duly implemented the latter provision of Amendment 3 as RIMFC Regulation 15.18. In June 1999, Medeiros was indicted in Rhode Island superior court after his otter trawler landed 131 lobsters. The case was ultimately dismissed.

Some state officials were less than enthusiastic about Amendment 3. Mark Gibson, a former DEM official, and Jan H. Reitsma, a former director of DEM, stated that Amendment 3 was discriminatory and resulted in no genuine conservation benefit. In June 2000, over the strong objection of the Governor and the DEM, RIMFC repealed Regulation 15.18, and, pursuant to the Atlantic Coastal Act, ASMFC notified the Secretary of Commerce that Rhode Island was no longer in compliance with this "necessary" IFMP requirement. The Secretary agreed and announced an intention to impose a moratorium. However, in November 2000, Rhode Island reinstated Regulation 15.18, and stripped the RIMFC of its authority to rescind the ASMFC regulations. RIMFC is now a purely advisory body. See R.I. Gen. Laws § 20-3-2 (2001). Consequently, the moratorium never went into effect.

Medeiros submitted the instant complaint in state court against the ASMFC, the DEM, and the United States, alleging that Amendment 3 (as adopted through RIMFC Regulation 15.18) violates his rights to equal protection and substantive due process, and constitutes an unlawful "commandeering" of Rhode Island's legislative prerogatives under the Tenth Amendment. The defendants removed the case to the United States District Court for the District of Rhode Island. Thereafter, pursuant to cross-motions for summary judgment the district court dismissed all counts in the complaint. *Medeiros v. Atlantic States Marine Fisheries Comm'n*, 327 F. Supp. 2d 145 (D.R.I. 2004). Medeiros appeals.

II. DISCUSSION

Cross-motions for summary judgment are reviewed de novo, and all facts, as well as reasonable inferences therefrom, are reviewed in the light most favorable to the respective non-moving parties, with a view to determining whether (i) a genuine issue exists as to any material fact and (ii) either moving party is entitled to judgment as a matter of law. *See Barnes v. Fleet Nat'l Bank*, 370 F.3d 164, 170 (1st Cir. 2004).

A. The Equal Protection Claim

First, Medeiros claims that Amendment 3 and Regulation 15.18 violate the Equal Protection Clause, in that their discrimination between trap and non-trap lobstering methods bears no rational relationship to the asserted governmental purpose: to conserve the dwindling Atlantic lobster stock.

Legislation or regulation which neither employs a suspect classification[2] nor impairs fundamental rights,[3] will survive

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[2] Medeiros concedes that, unlike a racial or ethnic minority, for example, see *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 n.4 (1976), non-trap lobstermen are not a "suspect class" for equal protection purposes. *See Mills v. Maine*, 118 F.3d 37, 47 (1st Cir. 1997) (defining "suspect class" as "a class of persons characterized by some unpopular trait or affiliation . . . [that would] reflect any special likelihood of bias [against them] on the part of the ruling majority") (citation omitted).

[3] At oral argument on the summary judgment motion, Medeiros intimated that Amendment 3 and Regulation 15.18 infringe upon his fundamental right to pursue the livelihood or occupation of his choosing: in this case, lobstering. Both for equal protection and substantive due process purposes, however, see infra Section II.B, it is well settled that no such fundamental right exists, and that legislation or regulation impinging upon such a right therefore is subject only to "rational basis" review, rather than "strict scrutiny." *See, e.g., Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999); *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1311 (2d Cir. 1994); *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993); *Sisk v. Tex. Parks and Wildlife Dep't*,

constitutional scrutiny, provided the remedy is "rationally related" to a legitimate governmental purpose. *See Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 53 (1st Cir. 2005); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 355 (1st Cir. 2004). Remedial choices made by the appropriate legislative or regulatory body are invested with a strong presumption of validity, rebuttable only where the party challenging the legislation or regulation can establish that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *See Wine and Spirits*, 418 F.3d at 54 (citation omitted).

Regulation 15.18 was designed to ameliorate the unprecedented overfishing of Atlantic lobster stocks, and the resulting diminution in the overall vitality of those stocks. The defendants proffer two principal rationales for the differing treatment which Amendment 3 and Regulation 15.18 prescribe for trap and non-trap lobstering.

Traps are a targeted, passive method for harvesting lobster. The lobster trap rests passively on the ocean floor awaiting the lobsters, which come for bait that is designed to attract nothing but lobsters. Normally, newly molted lobsters, or "soft shedders," are not caught in traps, in part because the vents in the traps permit smaller lobsters to escape from the trap. Unless the smaller lobsters can escape, there cannot be a sufficient population of mature lobsters capable of egg production, and the ASMFC's goal of rebuilding the Atlantic lobster stocks would be threatened.

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644 F.2d 1056, 1058 n.5 (5th Cir. 1981) ("Fishing is not a fundamental right nor is the class of commercial fishermen a suspect class."); *Cherenzia v. Lynch*, 847 A.2d 818, 823-24 (R.I. 2004); cf. *Piper v. Supreme Court of N.H.*, 723 F.2d 110, 112 (1st Cir. 1983), aff'd, 470 U.S. 274 (1985) (noting that right to make a living may be "fundamental" under the Privileges and Immunities Clause).

In contrast, non-trap methods, e.g., bottom trawling, are both non-passive and non-selective. For the most part, the lobster is a coincidental and insignificant by-catch for trawlers fishing primarily for finfish. The trawler nets actively dredge the ocean floor, catching whatever species may be in their path and large enough to be caught in the mesh, and the act of trawling the bottom may cause significant shell damage to the vulnerable population of soft shell lobsters. The relatively small openings required in trawler nets in order to catch most finfish species also lead to the capture of numerous soft shedders, which likewise causes a diminution in overall egg production. For instance, seventy percent of the 131 lobsters seized from the Medeiros vessel in June 1999 were soft shedders, many of which were moribund.

Given these inherent differences between the trap and non-trap methods, these defendants opted to impose different limitations on each. Trap methods are more amenable to "input" controls, viz., limiting the number and size of lobsters which will be caught in the first instance. Accordingly, Amendment 3 limited the number of traps per vessel or expedition, their overall capacity, and the minimum size of their escape vents.[4]

On the other hand, such input controls were simply a less practicable and efficacious methodology for use in non-trap lobstering. For instance, had defendants prescribed that the

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[4] At oral argument Medeiros suggested, absent record support, that these limitations upon trap methods are entirely illusory, inasmuch as they do not restrict the number of times lobstermen may empty and reset traps. We disagree. If one trapper is allowed ten traps, and another only two, and we assume that each trapper has the same incentive to maximize his profits by resetting his traps as many times as is practicable (viz., allowing a sufficient time interval for capture), it logically follows that the trapper with only two traps is likely to catch fewer lobster in any given allotted time period. The same reasoning applies to the reductions in the capacity of each trap imposed pursuant to Amendment 3.

mesh openings in a trawler net were to be made significantly larger to enable the escape of small lobsters, the trawlers' primary catch of finfish would be necessarily and severely diminished as well. ASMFC rationally adopted the 100/500 limitation because it would reasonably account for the historical, coincidental capture of lobster during finfish trawling, while deterring trawlers from deliberately targeting more lobster. Thus, ASMFC decided to impose "output" controls upon non-trap methodologies.

The defendants point out as well that limitations upon non-trap methodologies are essential, in that even though the lobster by-catch on the part of fishing vessels presently employing non-trap methods constituted a relatively minor percentage of the overall lobster harvest,[5] fishing vessels confronted with ever-diminishing finfish stocks and/or with increasing regulatory limitations upon finfish harvesting or trap lobstering might turn increasingly to unregulated non-trap lobstering. Since non-trap methods have proven most destructive to the vulnerable population of soft shed lobsters, such a potential redirection of the vessels' efforts into non-trap lobstering eventually would undermine the essential aims of Amendment 3 and Regulation 15.18.

Medeiros maintains that these asserted reasons do not constitute a rational basis for equal protection purposes. He cites to the written opinions of Mark Gibson, a former DEM official, and Jan H. Reitsma, a former director of DEM, who opposed the 100/500 limit because (i) it would discriminate by placing catch limits on the non-trap sector, but none on the trap sector, and (ii) offered no conservation benefit, since non-trap landings constitute but a small fraction of the total lobster catch.

However sincere these officials may have been in regard to the usefulness of the 100/500 lobster catch limits, their opinions cannot satisfy the daunting burden of demonstrating

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[5] For example, by the year 2000, merely 1.62 percent of Rhode Island lobster landings were effected by non-trap methods.

that the 100/500 limit has no conceivable rational basis. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally . . . ."); *Wine and Spirits*, 418 F.3d at 53. A legislative or regulatory body is entrusted with "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived." *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 22 (1st Cir.) (citation omitted), cert. denied, 125 S. Ct. 505 (2004). Once a rational basis is identified, we must uphold the statute or regulation even in cases when there is no empirical data in the record to support the assumptions underlying the chosen remedy. *See Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004); *Donahue v. City of Boston*, 371 F.3d 7, 15 (1st Cir.) (noting that reasons need not be supported by record, and any "'plausible' justification will suffice") (citation omitted), cert. denied, 125 S. Ct. 498 (2004); *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001).

Amendment 3 and Regulation 15.18 reasonably "discriminate" by imposing "output controls" upon non-trap methods, as these methods are not amenable to the type of "input controls" imposed upon the trap sector. The defendants aptly note that any attempt to place comparable restrictions upon the non-trap sector would be unworkable. For example, any requirement that trawling nets have larger openings in their mesh would result in the coincident loss of finfish, the trawlers' primary catch. Moreover, even if practicable input controls could be placed upon the non-trap sector, the dredging method inherently poses a greater risk of lobster mortality not presented by the trap sector. *See N.Y. State Trawlers Assocs. v. Jorling*, 16 F.3d 1303, 1309-10 (2d Cir. 1994) (upholding against equal protection challenge a statutory prohibition on lobster trawling, based upon demonstrable damage to lobster populations from trawling method).

The reliance by Gibson and Reitsma upon the relatively small percentage of non-trap landings is similarly unavailing.

First, the conclusion which they draw – that the 100/500 limit has "no" conservation benefit – is demonstrably false; at the very least, the 100/500 limit would have some (albeit small) conservation benefit commensurate with the relative size of the non-trap sector. More importantly, a statute or regulation is not lacking in a rational basis simply because it addresses a broader problem in small or incremental stages. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). It is only necessary that there be some rational relation between the method chosen and the intended result. And it cannot be gainsaid that it is entirely plausible to anticipate that the 100/500 limit likely would decrease the non-trap harvesting of lobster to the extent such unrestricted harvesting previously occurred.

The yet more fatal fallacy in the Medeiros argument is that it conveniently ignores the assertion that the defendants designed the 100/500 limit as a prophylactic measure to prevent any future redirection of efforts from trap lobstering and finfishing into non-trap lobstering methods. As this court has noted, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" *Abdullah v. Commissioner of INS*, 84 F.3d 18, 20 (1st Cir. 1996) (quoting *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993)) (emphasis added; citation omitted). In an industry increasingly subjected to severe restrictions designed to enable the replenishment of rapidly dwindling fishing stocks, it was entirely rational for defendants to conclude that any opening left in the regulatory net could entice fishermen to venture an advantageous escape.

As surely as the opinion of the two DEM officials cannot be successfully utilized to second-guess the ASMFC's prerogatives, neither may the court second-guess such regulatory judgments. *See Beach Communications*, 508 U.S. at 313 ("Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *Dukes*, 427 U.S. at 303 ("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative

policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); *LCM Enters. v. Town of Dartmouth*, 14 F.3d 675, 679 (1st Cir. 1994); *Baker v. City of Concord*, 916 F.2d 744, 749 (1st Cir. 1990).

As the district court correctly concluded that Medeiros could not establish at trial that Amendment 3 and Regulation 15.18 lack any conceivable rational basis, it properly granted summary judgment for the defendants on the instant claim.

B. The Substantive Due Process Claim

Medeiros appeals as well from the district court ruling that he failed adequately or distinctly to plead the claim that Amendment 3 and Regulation 15.18 violate his right to substantive due process. Medeiros maintains that he adequately alleged that the regulations infringed upon his "fundamental right" to make a living, thereby triggering the heightened "strict scrutiny" standard of review.

However, at oral argument Medeiros conceded that the identical analysis applied to the equal protection and due process claims. If Medeiros alleged an infringement of a fundamental right, both claims were subject to "strict scrutiny" analysis. Otherwise, both claims were governed by the "rational basis" standard of review.

The right to "make a living" is not a "fundamental right," for either equal protection or substantive due process purposes. *See N.Y. State Trawlers*, 16 F.3d at 1309-12; supra note 3. Thus, Amendment 3 and Regulation 15.18 must be upheld against the Medeiros substantive due process challenge, in that, as we have already noted, see supra Section II.A; *E. Enters. v. Chater*, 110 F.3d 150, 159 (1st Cir. 1997) ("[A] court must apply substantially the same [rational basis] analysis to both substantive due process and equal protection challenges."), both are rationally related to the legitimate governmental purpose of lobster conservation. *See PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991) ("The doctrine of substantive due process 'does not protect

individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or an "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests."'") (citations omitted). Accordingly, the district court correctly entered summary judgment for the defendants on the Medeiros substantive due process claim.

C. The Tenth Amendment Claim

Finally, Medeiros maintains that he alleged a viable Tenth Amendment claim: that the Atlantic Coastal Act in general and in particular its provision permitting the Secretary of Commerce to impose a moratorium on any member State that refuses to adopt a "necessary" term of an IFMP constitutes an impermissible "commandeering" by the federal government of the states' legislative prerogatives. *See, e.g., Printz v. United States*, 521 U.S. 898, 924 (1997) (striking down Brady Act provision which required state law enforcement officers to assist in national instant background checks for firearm sales); *New York v. United States*, 505 U.S. 144, 168 (1992) (striking down provision requiring states to take title to radioactive waste as part of a federal regulatory initiative).[6] In other words, Medeiros intimates, the mere threat of a moratorium has compelled Rhode Island, against its will, to adopt the 100/500 limitation in Amendment 3.

The defendants counter that the instant claim must be dismissed on jurisdictional grounds since private citizens like Medeiros lack standing to assert Tenth Amendment claims, which are to be prosecuted (if at all) by the state. The defendants note as well that Rhode Island voluntarily has endorsed and continues to endorse the policy underlying the

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[6] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people."

enactment of the 100/500 limit, see R.I. Gen. Laws § 20-8-7 (requiring that all state officials take any action necessary to comply with the ACFCMA compact), and that even if the Atlantic Coastal Act or its moratorium were to be invalidated on Tenth Amendment grounds, Rhode Island voluntarily would elect to leave Regulation 15.18 in place, and therefore the harm incurred by Medeiros would not be redressed. In the alternative, the defendants contend that, even if Medeiros did have standing, the Atlantic Coastal Act does not constitute an impermissible "commandeering" of Rhode Island's legislative prerogatives, but rather a permissible "program of cooperative federalism" in which the federal and state governments have acted voluntarily in tandem to achieve a common policy objective. *See New York*, 505 U.S. at 167.

We resolve the threshold jurisdictional issue prior to reaching the merits of the Medeiros claim. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) (noting that court should not reach merits unless first assured that it has jurisdiction; to assume jurisdiction arguendo would result in an advisory opinion); *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-54 (1st Cir. 1999). We conclude, as did the district court, that Medeiros lacks standing to present a Tenth Amendment claim.

The United States Supreme Court has held that private citizens lack standing to maintain Tenth Amendment claims. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939) [hereinafter: "*TVA*"] ("As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment."). Medeiros incorrectly classifies the *TVA* holding as dictum. The Court dismissed the Tenth Amendment claim after analyzing both the standing issue and the merits, and hence, the former holding is an alternative ground, rather than obiter dictum. *See California v. United States*, 438 U.S. 645, 689 n.10 (1978); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Natural Res.*

Def. Council, Inc. v. Nuclear Regulatory Comm'n, 216 F.3d 1180, 1189 (D.C. Cir. 2000). Accordingly, the Supreme Court's explicit holding in *TVA*, which has never been reversed, remains binding precedent.

Medeiros counters that the Supreme Court's subsequent discussion of the Tenth Amendment in *New York v. United States*, 505 U.S. 144 (1992), undermines *TVA*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Id. at 181 (citation omitted). Medeiros suggests that this language is to be read as abrogating the principle that only the states' interests are protected by the Tenth Amendment, and if individual citizens also have interests, they must have standing in order to protect them in court. We do not agree.

First, as the *New York* decision does not mention *TVA*, it cannot be construed as expressly overruling it.[7] Moreover, even if the Medeiros reading of the passage were plausible and we were to conclude that its reasoning is inconsistent with *TVA*, we would remain bound to apply *TVA*. "If a precedent of [the Supreme] Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de*

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[7] In fact, the Supreme Court has reiterated its *TVA* holding in subsequent dicta. *Flast v. Cohen*, 392 U.S. 83, 105 (1968) (noting that private citizens cannot "assert the States' interest in their legislative prerogatives").

Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). The *TVA* decision has direct application to the instant case, in that it involved private parties attempting to assert Tenth Amendment claims, whereas *New York* did not. Rather, since *New York* involved a claim asserted only by a state, the question of private-party standing under the Tenth Amendment was never at issue; indeed, the word "standing" was never mentioned.

Moreover, the Medeiros interpretation of *New York* – as holding that individuals must have standing to bring Tenth Amendment claims in court – is by no means inarguable. The specific focus of the above-quoted discussion was whether a state could assert a Tenth Amendment "commandeering" claim where a previous administration of that state had initially acquiesced in the commandeering, or whether the Tenth Amendment claim had been waived. In responding that a state could never consent to an unconstitutional commandeering, the Supreme Court noted that the Amendment protects the individual citizens of the state generally by diffusing power among sovereigns, and therefore the State cannot waive a commandeering violation which in fact impinges upon that interest. *New York*, 505 U.S. at 182.

One might suppose that this proposition leads inevitably to the conclusion that, if a State refuses to oppose an unlawful commandeering, an individual citizen is the only remaining party with an interest and incentive to vindicate that violation, and therefore the *New York* Court necessarily must have envisioned that the private citizen would have standing to bring suit on the Tenth Amendment claim. While this is one plausible interpretation, it is not an inexorable one. Rather, the Court may simply have intended that the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence. If the Tenth Amendment is not waivable, individuals could petition state officials for redress at any time. We need not determine

which interpretation is more likely, but only that it is at least debatable whether, or to what extent, the *New York* decision undermines the *TVA* holding.

Medeiros also notes that the Court recently granted a writ of certiorari for the purpose of deciding this very issue, *see Pierce County, Washington v. Guillen*, 537 U.S. 129 (2003), and though it ultimately declined to reach the question, *id.* at 148 n.10, we should interpret this development as an indication of the Court's readiness to overturn *TVA*. We can draw no such inference on the basis of this development. Certiorari could mean either that the Court is interested in reexamining and/or overruling *TVA*, or that it merely intends to reaffirm *TVA* in the face of a circuit split on the issue. Those circuit court decisions which have held that private citizens possess standing to bring Tenth Amendment claims are problematic. For instance, the Eleventh Circuit's precedent commenced without any reference to *TVA*, and subsequent panels have expressed concern as to whether the omission has resulted in the perpetuation of a circuit precedent inconsistent with TVA. *See, e.g., Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (11th Cir. 2000) (Barkett, J., concurring). In addition, the Seventh Circuit has permitted a state police officer to maintain a Tenth Amendment claim that a federal regulation interfered with the officer's state law enforcement job by prohibiting persons convicted of domestic violence crimes from possessing guns, but in such specialized circumstances, it is debatable whether the plaintiff is acting in behalf of the state or simply as a private citizen. See *Gillespie v. City of Indianapolis*, 185 F.3d 693, 702-04 (7th Cir. 1999); *cf. Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (noting in dicta that *TVA* likely would preclude Tenth Amendment standing to a purely private citizen, yet holding that a county sheriff and a chief of police possessed standing to assert a commandeering claim). In contrast, many courts explicitly have held that *TVA*, until overruled, bars Tenth Amendment claims by private citizens. *See, e.g., United States v. Parker*, 362 F.3d 1279, 1284-85

(10th Cir.), cert. denied, 125 S. Ct. 88 (2004); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 147-48 (D.D.C. 2002), aff'd, 348 F.3d 1020 (D.C. Cir. 2003), cert. denied sub nom. *Citizens for Safer Cmtys.*, 541 U.S. 974 (2004); *Vt. Assembly of Home Health Agencies v. Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998).

We are particularly reluctant to second-guess the continuing viability of *TVA* regarding so complex an issue of constitutional law. If and when the Supreme Court revisits *TVA*, it may be confronted with the question as to how a private citizen proceeds to establish a Tenth Amendment "commandeering" claim where the State itself has acquiesced in the federal-state arrangement. For example, if Medeiros were to possess standing, the question might arise as to whether he should be allowed discovery to determine why Rhode Island officials initially adopted Regulation 15.18, or why those officials reinstated the regulation with dispatch following its brief repeal in 2000. On the other hand, if the State cannot acquiesce in a commandeering regime, *see New York*, 505 U.S. at 182, its actual motivation in enacting Regulation 15.18 might be immaterial. Finally, if private citizens possess standing to prosecute Tenth Amendment claims, it is not difficult to envision a substantial increase in such litigation before the federal courts. Given that potential, the prudential and precedential principle enunciated in *Rodriquez de Quijas* seems particularly apt. In the event *TVA* is no longer good law, it should be for the Supreme Court explicitly to overrule it.

Accordingly, we affirm the district court holding that Medeiros lacks standing to pursue a Tenth Amendment claim that the Atlantic Coastal Act constitutes an unconstitutional commandeering of the Rhode Island legislative processes.

Affirmed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 01-543ML

STEPHEN P. MEDEIROS

v.

ATLANTIC STATES MARINE FISHERIES COMMISSION; and JAN REITSMA, as Director of the RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, UNITED STATES OF AMERICA, intervenor

May 24, 2004, Decided
May 24, 2004, Filed

COUNSEL: For Plaintiff: Richard S. Humphrey, Amy E. Stratton, Law Offices of Richard B. Humphrey, Tiverton, RI.

For Plaintiff: Robert J. Caron, Providence, RI.

For RI Dept. Environmental Management, Director Jan Reitsma, Defendants: Terence Tierney, Department of Attorney General, Providence, RI.

For RI Dept. Environmental Management, Director Jan Reitsma, Defendants: Gary E. Powers, Department of Environmental Management, Wakefield, RI.

For Atlantic States Marine Fisheries Counsel: Paul A. Lenzini, Alexandria, VA.

For Atlantic States Marine Fisheries Counsel: Gregory L. Benik, Holland & Knight LLP, Providence, RI.

For Atlantic States Marine Fisheries Counsel, United States: R. Justin Smith, U.S. Department of Justice, Washington, DC.

For United States: Michael P. Iannotti, U.S. Attorney Office, Providence, RI.

JUDGES: Mary M. Lisi, United States District Judge.

MEMORANDUM AND ORDER

Mary M. Lisi, United States District Judge.

This matter is before the court on the plaintiff's motion for summary judgment and the defendants' cross-motions for summary judgment. For the reasons set forth below, the motion of the plaintiff, Stephen P. Medeiros ("Medeiros"), is denied. The cross-motions for summary judgment filed by the defendants, Atlantic States Marine Fisheries Commission ("ASMFC" or "the commission"), and Jan Reitsma in his capacity as director of the Rhode Island Department of Environmental Management ("RIDEM") are granted.

I.

This is an action for injunctive and declaratory relief. The plaintiff is a commercial fisherman who catches lobster by a non-trap method, specifically by dragging an otter trawl behind his fishing vessel. Third Amended Verified Complaint, P 1; Plf.'s Rule 12.1 Statement of Undisputed Facts, P 1. In Count I of his complaint,[1] plaintiff contends that a regulation adopted by ASMFC and RIDEM that imposes limits on the number of lobsters that may be landed by fishermen using non-trap methods is violative of the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution. In Count II, plaintiff asserts that the statutory scheme pursuant to which the regulation was implemented, the Atlantic Coastal Fisheries Cooperative Management Act ("the coastal management act"), 16 U.S.C. §§ 5101-5108, is violative of

[1] Unless otherwise indicated, all references herein are to plaintiff's third amended verified complaint.

the Tenth Amendment. The United States of America has intervened in this action for the purpose of addressing plaintiff's Tenth Amendment claim.

A. Statutory and Regulatory Framework.

ASMFC was established by the Atlantic States Marine Fisheries Compact, an interstate agreement consented to and approved by Congress in 1942. Pub. L. 77-539, 56 Stat. 267; see 16 U.S.C. § 5102(3). Rhode Island is a signatory to the compact. R.I. Gen. Laws § 20-8-1. The commission includes representatives from each signatory state. The compact was intended "to promote the better utilization of the fisheries, marine, shell and anadromous of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries and by the prevention of the physical waste of the fisheries from any cause." Pub. L. 77-539.

In 1993, Congress enacted the coastal management act, 16 U.S.C. §§ 5101-5108. The purpose of the enactment is "to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. § 5101(b). The coastal management act required ASMFC to prepare and adopt coastal fishery management plans providing for the conservation of coastal fishery resources. 16 U.S.C. § 5104(a)(1). Each compact-member state identified in a management plan is required to implement and enforce the plan's measures. 16 U.S.C. § 5104(b)(1). ASMFC is responsible for monitoring its member states' implementation and enforcement of fishery management plans. 16 U.S.C. § 5104(c). The commission is required to provide notice to the United States Secretary of Commerce of a state's noncompliance with a plan. 16 U.S.C. § 5105.

Within 30 days of receipt of a notice of noncompliance from the ASMFC, the secretary is required to determine whether the subject state has failed to carry out its implementation and enforcement responsibilities under §

5104, and, if so, "whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question." 16 U.S.C. § 5106(a). The secretary must afford the alleged noncomplying state an opportunity to be heard. 16 U.S.C. § 5106(b). If the secretary finds that a state has failed to carry out its responsibilities under § 5104 and that the measures at issue are necessary for fishery conservation, "the Secretary shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." 16 U.S.C. § 5106(c).

In December 1997, ASMFC adopted Amendment 3 to the Interstate Fishery Management Plan for American Lobster. Defs.' Rule 12.1 Supporting Statement of Material Facts, P 6. Rhode Island was among the member states voting in favor of the amendment. Administrative Record at 01401-01404. Amendment 3 included coastwide requirements applicable to all ASMFC member states, including Rhode Island. *See* Admin. Rec. at 02334, 02362. In addition to delineating regulations pertaining to the trap method of landing lobsters, the amendment set forth limits, applicable coastwide, on the number of lobsters that could be landed by fishermen using non-trap methods.

> **3.1.7 Limits on Landings by fishermen using gear or methods other than traps**
>
> Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to no more than 100 lobsters per day (based on a 24-hour period) up to a maximum 500 lobsters per trip, for trips 5 days or longer.

ASMFC Fishery Management Report No. 29, Amendment 3 to the Interstate Fishery Management Plan for American Lobster, Admin. Rec. at 02362.

The Rhode Island Marine Fisheries Council ("RIMFC"), through its enactment of Regulation 15.18, then rendered the non-trap landing limits set forth in ASMFC Amendment 3.1.7

applicable in Rhode Island's coastal waters.[2] Plf.'s Statement of Undisputed Facts, P 5.

Regulation 15.18 was repealed by RIMFC in June 2000. Id., 13; Defs.' Opposing Statement of Material Facts at 1. ASMFC then found that the state was not in compliance with Amendment 3. Plf.'s Statement of Undisputed Facts, P 14. Ultimately, in order to avoid imposition of a moratorium, the regulation was readopted by RIDEM in March 2001.[3] Id., P 16. Regulation 15.18 provides:

> Landings of lobsters taken by gear or methods other than trap-Limits.
>
> Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to not more than 100 lobsters per day (based on a 24-hour period) up to a maximum of 500 lobsters per trip for trips of five (5) days or longer.

Plf.'s Statement of Undisputed Facts, P 2.

B. The Present Litigation.

In October 2001, Medeiros instituted the instant action for declaratory and injunctive relief in the Rhode Island Superior Court. In November 2001, RIDEM removed the matter to this court.

The plaintiff catches fish by way of an otter trawl. Plf.'s Statement of Undisputed Facts, P 1. On occasion, plaintiff

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[2] From 1981 through July 13, 2001, the Rhode Island Marine Fisheries Council (RIMFC) possessed regulatory jurisdiction over all marine animal species within the state. R.I. Gen. Laws § 20-3-2, as amended through R.I. Pub. L. 1998, ch. 441, § 1. RIMFC's authority included the promulgation and adoption of rules and regulations governing lobster fishing within state territory. *Id.* In July 2001, § 20-3-2 was amended, limiting the council's role to serving in an advisory capacity to RIDEM's director. R.I. Pub. L. 2001, ch. 304, § 2.

[3] In November 2000, the state reinstated the non-trap limit on an emergency basis. Plf.'s Statement of Undisputed Facts, P 15.

catches lobsters in his nets. *Id.* On June 5, 1999, Medeiros was charged with a misdemeanor offense of having landed 131 lobsters by non-trap method in violation of the daily limit set forth in Regulation 15.18. Third Amended Verified Complaint P 30, Exh. B. The state superior court dismissed the charge. Id. P 30, Exh. C. The plaintiff avers that he seeks to catch, has caught, and anticipates catching more than 100 lobsters per day or 500 lobsters per trip via non-trap methods. *Id.* P 30.

In Count I of his complaint, Medeiros contends that Amendment 3 and Regulation 15.18 are violative of the Equal Protection and Due Process clauses. Specifically, plaintiff alleges that the challenged regulation imposes limits on lobster landings by non-trap methods without restricting the number of lobsters that may be caught through the use of lobster traps. Medeiros contends that the limitations imposed on non-trap landings are without any rational basis. The plaintiff seeks a declaration that the non-trap regulation is invalid and an order directing defendants to prepare an amendment to the lobster-fishery plan that "does not contain a possession limit for non-trap fishermen." *Id.* foll. P 35.

In Count II, plaintiff alleges that the coastal management act is violative of the Tenth Amendment. In particular, Medeiros contends that through the enactment, Congress has impermissibly required the state to impose federal regulations, including Regulation 15.18, governing lobster fishing within state waters.

The plaintiff seeks entry of summary judgment in his favor on both counts of his complaint. Both ASMFC and RIDEM have filed cross-motions for summary judgment.

On May 30, 2003, the court conducted a hearing concerning plaintiff's standing to maintain his complaint. For the reasons set forth on the record during the hearing, and as reflected in the court's written order entered on that same date, the court determined, based on the factual representations made by plaintiff's counsel, that the plaintiff

had proffered allegations sufficient to support a determination that Medeiros had sustained injury-in-fact as a result of the non-trap landing limitation.[4] Accordingly, the court concluded that plaintiff had standing to pursue Count I of his complaint. Order (May 30, 2003), P 1. The court reserved determination on the issue of plaintiff's standing to pursue his Tenth Amendment challenge as asserted in Count II. Id. P 3.

Further hearing on the parties' respective motions for summary judgment was conducted on July 28, 2003. The court then took the matter under advisement.

II.

A. Summary Judgment Standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Adria Int'l Group, Inc. v. Ferre Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001) (citing *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)).

B. Undisputed Facts.

The non-trap landing limits that are the subject of the instant litigation comprise one of several components of Amendment 3. *See* Admin. Rec. at 02362-02365. An increase in lobster landings was observed over the three-decade period preceding the amendment. *Id.* at 02346. That increase was attributed both to an increased abundance of lobsters and to an increase in fishing effort. Id. Increased fishing effort had

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[4] Pursuant to the court's directive, plaintiff has amended his complaint to incorporate the factual assertions proffered by counsel during the May 30, 2003 hearing.

been observed over the three-decade period preceding 1997. *Id.* at 02343. Intense fishing effort for lobster has resulted in the resource being overfished. Defs.' Supporting Statement of Material Facts, P 2. The purpose of Amendment 3 is to restore egg production in order to prevent overfishing in each of the seven lobster management areas designated in the plan. *Id.* PP 2, 4; Admin. Rec. at 02335, 02359. "Amendment 3 consists of a set of management measures, to be implemented by ASMFC member states, to bring all sources of lobster mortality in the seven management areas under control by capping and then reducing fishing effort in order to meet the [amendment's] egg-rebuilding targets." Defs.' Supporting Statement of Material Facts, P 5.

The primary method by which lobsters are landed is through the use of traps. *Id.* P 7; Admin. Rec. at 02343, 02346. For the 1984-1994 time period, non-trap landings, including by otter trawl nets, accounted for 2.33 percent of total lobster landings. Defs.' Supporting Statement of Material Facts, P 7; Admin. Rec. at 02343.

The increased fishing effort for lobster over the three-decade period examined was attributed to several factors, including an increase in the number of traps fished, an increase in the total area fished, more effective trap design and construction, and increased "soak" time (i.e. the amount of time that traps remain in the water before hauling). Admin Rec. at 02343.

The lobster management measures set forth in Amendment 3 included an increase in the minimum size of lobsters that could be possessed, a reduction in the permitted maximum number of traps that could be fished per vessel, an increase in the required size of trap escape vents, a reduction in maximum trap volume, and a requirement that traps not constructed entirely of wood contain a biodegradable panel that would allow for the escape of lobster in the event the trap was abandoned or lost. Defs.' Supporting Statement of Material Facts, PP 9-10; Admin. Rec. at 02362-02365. In

addition, Amendment 3 set forth the non-trap landing limits that are at issue in the instant litigation. Admin. Rec. at 02362.

As described by defendants, the purpose of the non-trap limitations was "to cap fishing effort and prevent the non-trap sector from redirecting its effort to the lobster fishery from other fisheries primarily targeted by that sector." Defs.' Supporting Statement of Material Facts, P 11. The plaintiff has not disputed this factual assertion and the court accepts the statement as true. *See* D.R.I. Loc. R. 12.1(d) ("The court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion, or by other evidentiary materials which the court may consider under Rule 56 of the Federal Rules of Civil Procedure.").

C. Equal Protection and Due Process Claims.

In Count I of his complaint, plaintiff asserts that the non-trap catch limitations set forth in Amendment 3 and Regulation 15.18 violate his Fourteenth Amendment right to equal protection, and his right to due process as guaranteed by the Fifth and Fourteenth Amendments. Specifically, plaintiff contends that the challenged provision treats fisherman who harvest lobsters by non-trap means differently from those who utilize lobster traps. Third Amended Verified Complaint, P 35. The plaintiff does not further delineate the substantive due process component of his claim and does not distinguish his due process claim from his equal protection argument. In fact, Medeiros' memorandum in support of his motion for summary judgment is silent as to the basis for his due process claim.[5] The plaintiff appears to rely entirely on an equal

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[5] The plaintiff's complaint does not allege deprivation of a property right. His motion for summary judgment and supporting memoranda are silent on this matter. At oral argument, upon

protection argument. Therefore, this court will examine Count I in the context of an equal protection analysis. *See Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 46 (1st Cir. 2003) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 20 (1981)) ("if [a] statute does not violate equal protection, 'it follows *a fortiori* that [it] does not violate the Fourteenth Amendment's Due Process Clause'").

It is undisputed that the regulation at issue neither burdens a fundamental right nor employs a suspect classification. Accordingly, the court must employ a "rational basis" standard in evaluating plaintiff's equal protection challenge. *E.g., Kittery Motorcycle*, 320 F.3d at 47 (citations omitted). "Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld ... when the legislative means are rationally related to a legitimate government purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (citations omitted).

Under the rational basis test, the challenged regulation is afforded a "strong presumption of validity." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). The rational basis test is satisfied "'if any reasonably conceivable set of facts could establish a rational relationship between [the challenged regulation] and the government's legitimate ends.'" *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 978 (1st Cir. 1989) (quoting *Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1021 (1st Cir. 1989)). The proffered facts need not be supported by an evidentiary record. *Kittery Motorcycle*, 320 F.3d at 47 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315. Moreover, the challenged regulation need not be the least burdensome or

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inquiry by the court, plaintiff's counsel described the property right at issue as plaintiff's "right to make a living."

the most effective means of accomplishing the regulatory goal. *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) (citing *Beach Communications*, 508 U.S. at 314)). To satisfy the rational basis test, the challenged regulation need not be "the *best* means of promoting a legitimate government interest." *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1309 (2d Cir. 1994). Rather, the regulation need only be "*a reasonable* means of promoting the interest." *Id.*

As a matter of law, based upon the undisputed facts presented, Amendment 3.1.7 and Regulation 15.18 survive rational basis scrutiny. There is no dispute that the conservation of coastal lobster fishery resources is a legitimate governmental objective. See id. Amendment 3 is a set of management measures designed to bring all sources of lobster mortality in its designated management areas under control by capping and then reducing fishing effort. Defs.' Supporting Statement of Material Facts, P 5.

Non-trap fishing is one source, albeit small, of lobster landings and contributes to lobster mortality. *Id.* P 7. The limitations on non-trap landings set forth in Amendment 3.1.7 and Regulation 15.18 comprise one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality. For example, the regulatory scheme also reduces the number of lobster traps that may be fished per vessel. *Id.* P 10. In sum, although non-trap lobster fishing is a smaller contributor to lobster mortality than trap fishing, the restrictions imposed upon the non-trap sector are rationally related to the recognized conservation objective.

The plaintiff challenges the efficacy of the non-trap limitations in furthering lobster conservation efforts. However, issues as to the degree, if any, that the landing limitations will in fact benefit fishery preservation are not relevant to the rational basis inquiry. *See Montalvo-Huertas*, 885 F.2d at 982 (quoting *Ferguson v. Skrupa*, 372 U.S. 726,

729 (1963)) (recognizing that it is not up to the federal courts to decide on the wisdom and utility of legislation).

This court, therefore, concludes that plaintiff's equal protection claim fails as a matter of law.

D. The Tenth Amendment Claim

In Count II of his complaint, plaintiff contends that the coastal management act is violative of the Tenth Amendment. Medeiros asserts that the enactment impermissibly compels the State of Rhode Island to implement and enforce a federal regulatory program. Specifically, Medeiros contends that the coastal management act requires the state to adopt and enforce ASMFC's fishery management plans including, in particular, the non-trap landing limitations at issue in this proceeding. The defendants and the intervenor contend that plaintiff lacks standing to pursue this claim.

The defendants and the United States proffer three grounds in support of their claim that plaintiff lacks standing to maintain a Tenth Amendment challenge to 16 U.S.C. §§ 5101-5108. First, RIDEM, ASMFC and the United States contend that Medeiros has not demonstrated that he has, or will sustain any distinct injury-in-fact from the non-trap landing limitations at issue. Second, the defendants and the intervenor assert that plaintiff, as a private citizen, lacks standing to pursue a Tenth Amendment challenge on behalf of the State of Rhode Island. Third, they allege that a determination that the coastal management act is violative of the Tenth Amendment will not redress the injury allegedly sustained by plaintiff.

The first ground proffered by defendants and the United States has been addressed previously by this court with regard to Count I. See Order (5/30/2003), P 1. Concerning Count II, the defendants have proffered the same absence-of-injury-in-fact argument that they made with respect to Count I. As with regard to Count I, this component of defendants' challenge to plaintiff's standing to pursue Count II of his complaint similarly fails.

Next, the court must consider whether plaintiff, as a private party, possesses standing to assert a Tenth Amendment challenge to the coastal management act. Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). The gravamen of plaintiff's Tenth Amendment claim is that the coastal management act amounts to an impermissible encroachment upon state sovereignty. The defendants and the United States contend that the constitutional right at issue inures to the state itself, not plaintiff, and that Medeiros, as a private plaintiff, lacks standing to pursue a claim of violation of that right on the state's behalf.

In *Tennessee Elec. Power Co., v. Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939), the Supreme Court stated that the appellants, fourteen private utility companies, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] Amendment." The parties and the intervenor dispute whether the Court's statement reflects the current state of the law on the subject.

Recently, the Supreme Court granted certiorari with regard to, but ultimately declined to address the question of whether private plaintiffs have standing to assert states' rights under the Tenth Amendment where the states' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question. *Pierce County, Washington v. Guillen*, 537 U.S. 129, 148 n.10 (2003). The Court of Appeals for the First Circuit has not addressed whether private litigants may pursue Tenth Amendment claims. Other circuit courts which have considered the issue are in disagreement. *Compare Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *Atlantic Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359 (11th Cir. 1982) (both finding private-party standing to assert Tenth Amendment claims), *with United States v. Parker*, 362 F.3d

1279 (10th Cir. 2004) (citing *Mountain States Legal Found. v. Costle*, 630 F.2d 754 (10th Cir. 1980) (concluding that no private-party standing); *see Nance v. E.P.A.*, 645 F.2d 701, 716 (9th Cir. 1981) (commenting that standing of private litigants to assert Tenth Amendment claim "may be seriously questioned"); *see also Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (not reaching private-party standing issue but noting disagreement).

In support of his claim of standing to assert a Tenth Amendment challenge to the coastal management act, plaintiff relies, in part, on *New York v. United States*, 505 U.S. 144 (1992). That proceeding involved Tenth Amendment challenges instituted by the State of New York and two of its counties to the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et seq. Because none of the cases had been instituted by private litigants, the issue of private party standing to assert Tenth Amendment claims was not a matter before the Supreme Court for consideration.

In addressing the merits of the petitioners' constitutional claims, the Supreme Court held that one of the three challenged provisions was violative of the Tenth Amendment. In so doing, the Court rejected respondents' assertion that the State of New York's consent to the statute's enactment precluded a determination that the provision amounted to an infringement of state sovereignty. *Id.* at 181. Specifically, the Court observed that the fundamental purpose of the Constitution was to protect individuals rather than the states themselves:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is

> not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Id. (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Accordingly, "where Congress exceeds its authority relative to the States ... the departure from the constitutional plan cannot be ratified by the "consent" of state officials." *Id.* at 182.

However, the Supreme Court's dicta in *New York* is not determinative of the issue presented in the instant proceeding. The standing of a private litigant to assert a Tenth Amendment claim was not an issue presented in that litigation. The Supreme Court has not expressly overruled *Tennessee Elec. Power Co.* In fact, more than ten years after issuance of its opinion in *New York*, the Supreme Court, although having had the opportunity to do so in *Pierce County*, declined to address the private party standing issue. Under such circumstances, the principle enunciated in *Tennessee Elec. Power Co.* remains in force and this court is bound to apply it. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). *But see Gillespie v. City of Indianapolis*, 185 F.3d at 703 (relying on *New York* in determining that a private litigant had standing to assert a Tenth Amendment claim). Accordingly, this court concludes that Medeiros, as a private litigant, lacks standing to assert a Tenth Amendment challenge to the coastal management act.[6]

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[6] In light of the court's determination on this point, the court does not reach the "redressability" component of defendants' and intervenor's standing challenge.

III.

For the above reasons, the motion of the plaintiff, Stephen P. Medeiros, for entry of summary judgment is denied. The cross-motions for summary judgment filed by the defendants Atlantic States Marine Fisheries Council and Jan Reitsma in his capacity as director of the Rhode Island Department of Environmental Management are granted.

SO ORDERED.

Mary M. Lisi
United States District Judge

May 24, 2004

RELEVANT STATUTORY PROVISIONS

1. The Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5101-08, provides in relevant part:

§ 5101. Findings and purpose

(a) Findings

The Congress finds the following:

(1) Coastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States and of the Federal Government are of substantial commercial and recreational importance and economic benefit to the Atlantic coastal region and the Nation.

(2) Increased fishing pressure, environmental pollution, and the loss and alteration of habitat have reduced severely certain Atlantic coastal fishery resources.

(3) Because no single governmental entity has exclusive management authority for Atlantic coastal fishery resources, harvesting of such resources is frequently subject to disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation and sustainable use of such resources and to the interests of fishermen and the Nation as a whole.

(4) The responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission. It is the responsibility of the Federal Government to support such cooperative interstate management of coastal fishery resources.

(5) The failure by one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of Atlantic coastal fisheries, and can discourage other

States from fully implementing coastal fishery management plans.

(6) It is in the national interest to provide for more effective Atlantic State fishery resource conservation and management.

(b) Purpose

The purpose of this chapter is to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources.

§ 5102. Definitions

In this chapter, the following definitions apply:

(1) The term "coastal fishery management plan" means a plan for managing a coastal fishery resource, or an amendment to such plan, prepared and adopted by the Commission, that--

(A) contains information regarding the status of the resource and related fisheries; and

(B) specifies conservation and management actions to be taken by the States.

(2) The term "coastal fishery resource" means any fishery, any species of fish, or any stock of fish that moves among, or is broadly distributed across, waters under the jurisdiction of two or more States or waters under the jurisdiction of one or more States and the exclusive economic zone.

(3) The term "Commission" means the Atlantic States Marine Fisheries Commission established under the interstate compact consented to and approved by the Congress in Public Laws 77-539 and 81-721.

(4) The term "conservation" means the restoring, rebuilding, and maintaining of any coastal fishery resource and the marine environment, in order to assure the availability of coastal fishery resources on a long-term basis.

(5) The term "Councils" means Regional Fishery Management Councils established under section 1852 of this title.

(6) The term "exclusive economic zone" means the exclusive economic zone of the United States established by Proclamation Number 5030, dated March 10, 1983. For the purposes of this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of that zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

(7) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal life other than marine mammals and birds.

(8) The term "fishery" means--

(A) one or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographical, scientific, technical, commercial, recreational, or economic characteristics; or

(B) any fishing for such stocks.

(9) The term "fishing" means--

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity that can be reasonably expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity or the catching, taking, or harvesting of fish in an aquaculture operation.

(10) The term "implement and enforce" means to enact and implement laws or regulations as required to conform with the provisions of a coastal fishery management plan and to assure compliance with such laws or regulations by persons participating in a fishery that is subject to such plan.

(11) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

(12) The term "Secretary" means the Secretary of Commerce.

(13) The term "State" means Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, the District of Columbia, or the Potomac River Fisheries Commission.

§ 5103. State-Federal cooperation in Atlantic coastal fishery management

(a) Federal support for State coastal fisheries programs

The Secretary in cooperation with the Secretary of the Interior shall develop and implement a program to support the interstate fishery management efforts of the Commission. The program shall include activities to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning.

(b) Federal regulation in exclusive economic zone

(1) In the absence of an approved and implemented fishery management plan under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), and after consultation with the appropriate Councils,

the Secretary may implement regulations to govern fishing in the exclusive economic zone that are--

(A) compatible with the effective implementation of a coastal fishery management plan; and

(B) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851).

The regulations may include measures recommended by the Commission to the Secretary that are necessary to support the provisions of the coastal fishery management plan. Regulations issued by the Secretary to implement an approved fishery management plan prepared by the appropriate Councils or the Secretary under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.) shall supersede any conflicting regulations issued by the Secretary under this subsection.

(2) The provisions of sections 307, 308, 309, 310, and 311 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857, 1858, 1859, 1860, and 1861) regarding prohibited acts, civil penalties, criminal offenses, civil forfeitures, and enforcement shall apply with respect to regulations issued under this subsection as if such regulations were issued under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

§ 5104. State implementation of coastal fishery management plans

(a) Coastal fishery management plans

(1) The Commission shall prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources. In preparing a coastal fishery management plan for a fishery that is located in both State waters and the exclusive economic zone, the Commission shall consult with appropriate Councils to determine areas where such coastal fishery management plan may

complement Council fishery management plans. The coastal fishery management plan shall specify the requirements necessary for States to be in compliance with the plan. Upon adoption of a coastal fishery management plan, the Commission shall identify each State that is required to implement and enforce that plan.

(2) Within 1 year after December 20, 1993, the Commission shall establish standards and procedures to govern the preparation of coastal fishery management plans under this chapter, including standards and procedures to ensure that--

(A) such plans promote the conservation of fish stocks throughout their ranges and are based on the best scientific information available; and

(B) the Commission provides adequate opportunity for public participation in the plan preparation process, including at least four public hearings and procedures for the submission of written comments to the Commission.

(b) State implementation and enforcement

(1) Each State identified under subsection (a) of this section with respect to a coastal fishery management plan shall implement and enforce the measures of such plan within the timeframe established in the plan.

(2) Within 90 days after December 20, 1993, the Commission shall establish a schedule of timeframes within which States shall implement and enforce the measures of coastal fishery management plans in existence before December 20, 1993. No such timeframe shall exceed 12 months after the date on which the schedule is adopted.

(c) Commission monitoring of State implementation and enforcement

The Commission shall, at least annually, review each State's implementation and enforcement of coastal fishery management plans for the purpose of determining whether

such State is effectively implementing and enforcing each such plan. Upon completion of such reviews, the Commission shall report the results of the reviews to the Secretaries.

§ 5105. State noncompliance with coastal fishery management plans

(a) Noncompliance determination

The Commission shall determine that a State is not in compliance with the provisions of a coastal fishery management plan if it finds that the State has not implemented and enforced such plan within the timeframes established under the plan or under section 5104 of this title.

(b) Notification

Upon making any determination under subsection (a) of this section, the Commission shall within 10 working days notify the Secretaries of such determination. Such notification shall include the reasons for making the determination and an explicit list of actions that the affected State must take to comply with the coastal fishery management plan. The Commission shall provide a copy of the notification to the affected State.

(c) Withdrawal of noncompliance determination

After making a determination under subsection (a) of this section, the Commission shall continue to monitor State implementation and enforcement. Upon finding that a State has complied with the actions required under subsection (b) of this section, the Commission shall immediately withdraw its determination of noncompliance. The Commission shall promptly notify the Secretaries of such withdrawal.

§ 5106. Secretarial action

(a) Secretarial review of Commission determination of noncompliance

Within 30 days after receiving a notification from the Commission under section 5105(b) of this title and after

review of the Commission's determination of noncompliance, the Secretary shall make a finding on--

(1) whether the State in question has failed to carry out its responsibility under section 5104 of this title; and

(2) if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question.

(b) Consideration of comments

In making a finding under subsection (a) of this section, the Secretary shall--

(A) give careful consideration to the comments of the State that the Commission has determined under section 5105(a) of this title is not in compliance with a coastal fishery management plan, and provide such State, upon request, with the opportunity to meet with and present its comments directly to the Secretary; and

(B) solicit and consider the comments of the Commission and the appropriate Councils.

(c) Moratorium

(1) Upon making a finding under subsection (a) of this section that a State has failed to carry out its responsibility under section 5104 of this title and that the measures it failed to implement and enforce are necessary for conservation, the Secretary shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State. The Secretary shall specify the moratorium's effective date, which shall be any date within 6 months after declaration of the moratorium.

(2) If after a moratorium is declared under paragraph (1) the Secretary is notified by the Commission that the Commission is withdrawing under section 5105(c) of this title the determination of noncompliance, the Secretary shall immediately determine whether the State is in compliance with the applicable plan. If so, the moratorium shall be terminated.

(d) Implementing regulations

The Secretary may issue regulations necessary to implement this section. Such regulations--

(1) may provide for the possession and use of fish which have been produced in an aquaculture operation, subject to applicable State regulations; and

(2) shall allow for retention of fish that are subject to a moratorium declared under this section and unavoidably taken as incidental catch in fisheries directed toward menhaden if--

(A) discarding the retained fish is impracticable;

(B) the retained fish do not constitute a significant portion of the catch of the vessel; and

(C) retention of the fish will not, in the judgment of the Secretary, adversely affect the conservation of the species of fish retained.

(e) Prohibited acts during moratorium

During the time in which a moratorium under this section is in effect, it is unlawful for any person to--

(1) violate the terms of the moratorium or of any implementing regulation issued under subsection (d) of this section;

(2) engage in fishing for any species of fish to which the moratorium applies within the waters of the State subject to the moratorium;

(3) land, attempt to land, or possess fish that are caught, taken, or harvested in violation of the moratorium or of any implementing regulation issued under subsection (d) of this section;

(4) fail to return to the water immediately, with a minimum of injury, any fish to which the moratorium applies that are taken incidental to fishing for species other than those to which the moratorium applies, except as provided by regulations issued under subsection (d) of this section;

(5) refuse to permit any officer authorized to enforce the provisions of this chapter to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter;

(6) forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this chapter;

(7) resist a lawful arrest for any act prohibited by this section;

(8) ship, transport, offer for sale sell, purchase, import, or have custody, control, or possession of, any fish taken or retained in violation of this chapter; or

(9) interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section.

(f) Civil and criminal penalties

(1) Any person who commits any act that is unlawful under subsection (e) of this section shall be liable to the United States for a civil penalty as provided by section 308 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1858).

(2) Any person who commits an act prohibited by paragraph (5), (6), (7), or (9) of subsection (e) of this section is guilty of an offense punishable as provided by section 309(a)(1) and (b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1859(a)(1) and (b)).

(g) Civil forfeitures

(1) Any vessel (including its gear, equipment, appurtenances, stores, and cargo) used, and any fish (or the fair market value thereof) taken or retained, in any manner, in connection with, or as the result of, the commission of any act that is unlawful under subsection (e) of this section, shall be subject to forfeiture to the United States as provided in

section 310 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1860).

(2) Any fish seized pursuant to this chapter may be disposed of pursuant to the order of a court of competent jurisdiction or, if perishable, in a manner prescribed in regulation.

(h) Enforcement

A person authorized by the Secretary or the Secretary of the department in which the Coast Guard is operating may take any action to enforce a moratorium declared under subsection (c) of this section that an officer authorized by the Secretary under section 311(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861(b)) may take to enforce that Act [16 U.S.C.A. § 1801 et seq.]. The Secretary may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal department or agency and of any agency of a State in carrying out that enforcement.

§ 5107. Financial assistance

The Secretary and the Secretary of the Interior may provide financial assistance to the Commission and to the States to carry out their respective responsibilities under this chapter, including--

(1) the preparation, implementation, and enforcement of coastal fishery management plans; and

(2) State activities that are specifically required within such plans.

2. The Atlantic State Marine Fisheries Compact, Pub. L. 77-539, 56 Stat. 267, as amended by Pub. L. 81-721, 64 Stat. 467, provides in relevant part:

AN ACT

Granting the consent and approval of Congress to an interstate compact relating to the better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to an interstate compact relating to the better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission, negotiated and entered into or to be entered into under the authority of Public Resolution Numbered 79, Seventy-sixth Congress, approved June 8, 1940, and now ratified by the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia, which compact reads as follows:

"The contracting states solemnly agree:

ARTICLE I

The purpose of this compact is to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause. It is not the purpose of this compact to authorize the states joining herein to limit the production of fish or fish products for the purpose of establishing or fixing the price thereof, or creating and perpetuating monopoly.

ARTICLE II

This agreement shall become operative immediately as to those states executing it whenever any two or more of the States of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida have executed it in the form that is in accordance with the laws of the executing state and the Congress has given its consent. Any state contiguous with any of the aforementioned state and riparian upon waters frequented by anadromous fish, flowing into waters under the jurisdiction of any of the aforementioned states, may become a party hereto as hereinafter provided.

ARTICLE III

Each state joining herein shall appoint three representatives to a Commission hereby constituted and designated as the Atlantic States Marine Fisheries Commission. One shall be the executive officer of the administrative agency of such state charged with the conservation of the fisheries resources to which this compact pertains or, if there be more than one officer or agency, the official of the state named by the governor thereof. The second shall be a member of the legislature of such state designated by the said Commission or Committee on Interstate Cooperation of such state, or if there be none, or if said Commission on Interstate Cooperation cannot constitutionally designate the said member, such legislator shall be designated by the governor thereof; provided, that if it is constitutionally impossible to appoint a legislator as a commissioner from such state, the second member shall be appointed by the governor of said state in his discretion. The third shall be a citizen who shall have knowledge of the interest in the marine fisheries problem, to be appointed by the governor. The Commission shall be a body corporate with the powers and duties set forth herein.

ARTICLE IV

The duty of the said Commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about the conservation of, the prevention of the depletion and physical waste of the fisheries, marine, shell and anadromous of the Atlantic seaboard. The Commission shall have power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of those fisheries and their protection against overfishing, waste, depletion or any abuse whatsoever and to assure a continuing yield from the fisheries resources of the aforementioned states.

To that end, the Commission shall draft and, after consultation with the Advisory Committee hereinafter authorized, recommend to the governors and legislatures of the various signatory states, legislation dealing with the conservation of the marine, shell and anadromous fisheries of the Atlantic seaboard. The Commission shall, more than one month prior to any regular meeting of the legislature in any signatory state, present to the governor of the state its recommendations relating to enactment to be made by the legislature of that state in furthering the intents and purposes of this Compact.

The Commission shall consult with and advise the pertinent administrative agencies in the states party hereto with regard to problems connected with the fisheries and recommend the adoption of such regulations as it deems advisable.

The Commission shall have power to recommend to the states party hereto the stocking of the waters of such states with fish and fish eggs, or joint stocking by some or all of the states party hereto, and when two or more of the states shall jointly stock waters the Commission shall act as the coordinating agency for such stocking.

ARTICLE V

The Commission shall elect from its number a Chair and a Vice Chair and shall appoint, at its pleasure, remove or discharge such officers and employees as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. Said Commission shall adopt rules and regulations for the conduct of its business. It may establish and maintain one or more offices for the transaction of its business and may meet at any time or place but must meet at least once a year.

ARTICLE VI

No action shall be taken by the Commission in regard to its general affairs except by the affirmative vote of a majority of the whole number of compacting states present at any meeting. No recommendation shall be made by the Commission in regard to any species of fish except by the affirmative vote of a majority of the compacting states which have an interest in such species. The Commission shall define what shall be an interest.

ARTICLE VII

The Fish and Wildlife Service of the Department of the Interior of the Government of the United States shall act as the primary research agency of the Atlantic States Marine Fisheries Commission, cooperating with the research agencies in each state for that purpose. Representatives of the said Fish and Wildlife Service shall attend the meetings of the Commission.

An Advisory Committee to be representative of the commercial fishermen and the salt water anglers and such other interests of each state as the Commission deems advisable shall be established by the Commission as soon as practicable for the purpose of advising the Commission upon such recommendation as it may desire to make.

ARTICLE VIII

When any state other than those named specifically in Article II of this compact shall become a party thereto for the purpose of conserving its anadromous fish in accordance with the provisions of Article II, the participation of such state in the action of the Commission shall be limited to such species of anadromous fish.

ARTICLE IX

Nothing in this compact shall be construed to limit the powers of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries.

ARTICLE X

Continued absence of representation or of any representative on the Commission from any state party hereto shall be brought to the attention on the governor thereof.

ARTICLE XI

The states party hereto agree to make annual appropriations to the support of the Commission in proportion to the primary market value of the products of their fisheries, exclusive of cod and haddock, as recorded in the most recent published reports of the Fish and Wildlife Service of the United States Department of the Interior, provided no state shall contribute less than two hundred dollars per annum and the annual contribution of each state above the minimum shall be figured to the nearest one hundred dollars. The compacting states agree to appropriate initially the annual amounts scheduled below, which amounts are calculated in the manner set forth herein, on the basis on the catch record of 1938. Subsequent budgets shall be recommended by a majority of the Commission and the cost thereof allocated equitable among states in accordance with their respective interests and submitted to the compacting states.

SCHEDULE OF INITIAL STATE CONTRIBUTIONS

Maine	$700	Delaware	$200
New Hampshire	200	Maryland	700
Massachusetts	2,300	Virginia	1,300
Rhode Island	300	North Carolina	600
Connecticut	400	South Carolina	200
New York	1,300	Georgia	200
New Jersey	800	Florida	1,500

ARTICLE XII

This compact shall continue in force and remain binding upon each compacting state until renounced by it. Renunciation of this compact must be preceded by sending six months notice in writing of intention to withdraw from the compact to the other states party hereto.

SECTION 2. Without further submission of said compact, the consent and approval of Congress is hereby given to the States of Connecticut, North Carolina, South Carolina, Georgia and Florida, and for the purpose of the better utilization of their anadromous fisheries, to the States of Vermont and Pennsylvania, to enter into said compact as signatory States and as parties thereto, in addition to the States which have now ratified the compact.

SECTION 3. The Atlantic States Marine Fisheries Commission constituted by the compact shall make an annual report to Congress not later than sixty days after the beginning of each regular session thereof. Such report shall set forth the activities of the Commission during the calendar year ending immediately prior to the beginning of such session.

SECTION 4. The right to alter, amend or repeal the provisions of Sections 1, 2, and 3 is hereby expressly reserved, (approved May 4, 1942); provided that nothing in this compact shall be construed to limit or add to the powers or the proprietary interest of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of

any requirement by a signatory state imposing additional conditions and restrictions to conserve its fisheries.

AMENDMENT NUMBER ONE

The States consenting to this amendment agree that any two or more of them may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating States with respect to specific fisheries in which such States have a common interest. The representatives of such States on the Atlantic States Marine Fisheries Commission shall constitute a separate section of such Commission for the exercise of the additional powers so granted provided that the States so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the States participating therein of any of their privileges or powers or responsibilities in the Atlantic States Marine Fisheries Commission under the general compact."

3. Amendment 3 to the Interstate Fishery Management Plan for American Lobster provides in relevant part:

MANAGEMENT PROGRAM IMPLEMENTATION

Amendment 3 completely replaces all previous fishery management plans and amendments for the Atlantic States Marine Fisheries Commission.

3.1 COASTWIDE REQUIREMENTS AND PROHIBITED ACTIONS

Measures in this section are required for all states and all areas and can only be changed by amending the fishery management plan.

* * * * *

3.1.7 Limits on Landings by fishermen using gear or methods other than traps

Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to no more than 100 lobsters per day (based on a 24-hour period) up to a maximum of 500 lobsters per trip, for trips 5 days or longer.

4. Rhode Island Department of Environmental Management Regulation 15.18 provides:

Landings by fishermen using gear or methods other than traps (non-trap fishermen) will be limited to no more than 100 lobsters per day (based on a 24-hours period) up to a maximum of 500 lobsters per trip, for trips of five (5) days or longer.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Environmental Management
Division of Fish and Wildlife
MARINE BASE
150 Fowler Street
Wickford, RI 02852
(401) 294-4524 FAX (401) 294-9640

12/22/98

Ernest Beckwith
Chairman, ASMFC Lobster Board
Connecticut Department Environmental Protection
Fisheries Division
79 Elm St.
Hartford CT, 06106-5127

Dear Mr. Beckwith,

I wanted to inform you, prior to our board meeting in January, that Rhode Island has come into compliance with the mobile gear regulation required by the ASMFC lobster FMP. The possession limits on non-trap gear were taken to public hearing in November. After the hearing, the RI Marine Fisheries Council adopted the regulations and the Division has filed with the Secretary of State. They will be in force in January. A copy of the new regulation (15.18) is attached for your benefit. I trust that this action will nullify the board motion findng Rhode Island out of compliance. This motion has been deferred until the January 1999 board meeting. I will be prepared to discuss this item at the meeting.

I have a related item for the agenda that we request discussion on. The above regulation has been controversial for us and is likely to result in a legal challenge from the

mobile gear sector. They regard and I agree, that this element of the Commission's plan is discriminatory. The FMP imposes direct catch limits on a gear which comprises only a small fraction of the lobster catch but allows the trap sector unlimited catch. The trap reductions are indirect measures and are unlikely to reduce catch in the trap sector.

Our Marine Fisheries Council has requested that I petition the Commission for consideration of an adjustment to the FMP which would move this element from mandatory status to discretionary so that a state could avail itself of conservation equivalency. The principle of plan flexibility in deference to individual state needs has a long tradition in Commission activities. Thank you for your consideration in this matter.

Sincerely,
/s/
Mark R. Gibson
Supervising Marine Biologist

cc David Borden – RIDEM
Richard Sission – RIDFW
Amy Schick – ASMFC

RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

DIVISION OF FISH AND WILDLIFE
4808 Tower Hill Road
Wakefield, RI 02879

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January 12, 2000

Mr. Gordon Colvin
Chair-Atlantic States Marine Fisheries Commission Lobster Management Board
New York Department of Environmental Conservation
Bureau of Marine Resources
205 North Belle Meade Road, Suite 1
East Setauket, NY 11733

Dear Mr. Colvin,

As you know, the State of Rhode Island was found out of compliance with the Atlantic States Marine Fisheries Commission lobster fishery management plan. This finding, which began with the lobster management board, was recent affirmed by NMFS/NOAA after the review required under the Atlantic Coastal Fisheries Act. The reason for the determination was Rhode Island's failure to maintain the 100/500 limit on non-trap gear landings. We have begun the process of coming into compliance with the plan through an emergency rule promulgated under the Director's authority. I expect our marine fisheries council to adopt a final rule in late February after public comment.

I have been requested by RIDEM Director Reitsma to obtain the basis for the determination as is required by the Commission's charter. He is concerned that the Commission's finding and NMFS concurrence were procedurally flawed in that there was no documentation of

how the conservation objectives of the FMP were threatened. To the contrary, evidence was provided which showed that standard 2 of the NMFS review and evaluation procedure could not be met. Consistent with his request, I am asking that this issue be placed on the agenda of the February 2 meeting of the lobster board. I would like the board and/or Commission to provide me with the basis for the non-compliance determination, particularly as it relates to how Rhode Island's regulatory deficiency threatened the conservation benefits of the lobster FMP.

Sincerely,

Mark R. Gibson
Deputy Chief-Marine Fisheries

cc Heather Stirratt – ASMFC
David Borden – RIDEM

RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
235 Promenade Street, Providence, RI 02908-5767
TDD 401-831-5508

December 5, 2000

Richard Schaefer
Chief, Staff Office for Intergovernmental and
Recreational Fisheries
National Marine Fisheries Service
8484 Georgia Ave., Suite 425
Silver Spring, MD 20910

Dear Mr. Schaefer:

As you know, on October 19, 2000, the State of Rhode Island was found by the Atlantic States Marine Fisheries Commission (ASMFC) to be out of compliance with Amendment 3 to the Interstate Fishery Management Plan for American Lobster. On November 3, this determination was forwarded to the Secretary of Commerce and Secretary of Interior for review. On November 13, Penelope Dalton, Assistant Administrator for Fisheries with the National Marine Fisheries Service (NMFS), wrote to Governor Lincoln Almond, notifying him of your agency's intent to complete its evaluation and issue findings by December 6. In the context of this evaluation, Ms. Dalton offered the State the opportunity to meet with NMFS representatives to discuss the issue.

On behalf of the Governor, and through you, I wish to extend my thanks to Ms. Dalton for providing us with the opportunity to comment on this important issue. A meeting with NMFS representatives is taking place today in Providence, R.I., where this letter is being presented and our case is being stated as follows.

The State has re-adopted the regulation necessary to bring Rhode Island back into compliance with the Lobster

Plan. We remain convinced, however, that the regulation is inappropriate for application in Rhode Island waters. Rather than continue to run afoul of the requirements of the Lobster Plan, we are opting to vigorously pursue the adoption of Amendment 4 to the Plan, which, as proposed, would provide Rhode Island with the flexibility to enact an alternative measure tailored to meet State needs and concerns.

By way of background, Rhode Island was deemed out of compliance with the Lobster Plan because the State rescinded a regulation that limited the possession of lobster by non-trap gear to 100 lobsters per day, up to a minimum of 500 lobsters for trips five days or longer. This so-called "100/500" provision is a mandatory element of the Plan.

Rhode Island has long maintained that the 100/500 rule provides no meaningful conservation benefit in this state and may be discriminatory. I have attached fishery data and stock status information from the Department's Fish and Wildlife Division. They show that otter trawl landings are a relatively insignificant component of the state lobster catch – constituting just 1% of total lobster landings – and that fishing mortality from trawling has been consistently low over the past decade, while trap mortality has risen. Trawling opportunities for lobster in Rhode Island are naturally limited by the abundance of rocky areas and the preponderance of traps. Imposing possession limits on the relatively minuscule and constrained trawl fishery provides no meaningful conservation benefit. Without a rational basis, the 100/500 rule appears to be discriminatory due to the allowance of unrestricted catches on the part of the trap fishery.

For some time now, Rhode Island has been pursuing a reasonable solution to address the problems posed by the 100/500 rule: amending the Lobster Plan to allow individual states more flexibility in allocating the resource among stakeholders. Specifically, we have asked the ASMFC for an amendment that would change the mobile gear provision from mandatory to discretionary status where conservation

equivalency can be demonstrated. We hold that the issue of resource allocation in state waters is best left to the individual states. The ASMFC has concurred and agreed to begin the process of developing and adopting Amendment 4.

Unfortunately, the plan amendment process, which is innately time-consuming, has been further delayed by pending issues associated with the full implementation of Amendment 3. Frustrated over the lack of progress on Amendment 4, and pressed by the otter trawl fishery to provide relief, the RI Marine Fisheries Council voted to rescind the 100/500 this past summer. The move put the Governor and me in an awkward position, for while we shared the concerns of the Council, we disagreed with the strategy of falling out of compliance with the Lobster Plan and triggering the possibility of a moratorium. The rescission thus went forward without my signature.

On November 28, with the moratorium process underway, the RI Marine Fisheries Council took up the issue again. After considerable soul searching, the Council agreed to forward a recommendation to me to initiate an emergency action to reinstate the 100/500 regulation. On November 29, I signed and filed the regulation with the RI Secretary of State's Office. I have attached a copy. The regulation took effect immediately and will remain in force for 120 days, with an option to renew for an additional 90 days. The RI Council will be conducting a public hearing on February 13, 2001 to take public comment on reinstating the 100/500 regulation as a permanent rule.

By re-adopting the 100/500 rule, Rhode Island has come back into compliance with the Lobster Plan and, presumably, forestalled the threat of a moratorium. Please confirm this in writing at your earliest convenience. It is now essential that we press forward with Amendment 4. I respectfully request your assistance in helping to support and expedite this process.

I also feel strongly that due to long-standing concerns regarding state-federal relations in fisheries management, we must meet to assess where we are and what changes need to be made to improve the process. Accordingly, I will be asking our Congressional Delegation to work with us to schedule a meeting with Ms. Dalton on this issue as soon as possible.

Thank you for your time and interest and your willingness to work with us to resolve this matter. If you require any additional information, please contact me (401-222-4700, ext. 2406) or Mark Gibson (401-789-3094, ext. 7753). We remain committed to working constructively with your agency and our state counterparts to improve the management of our interstate fishery resources.

Sincerely,
/s/
Jan H. Reitsma
Director

cc: Governor Lincoln Almond
Penelope Dalton
RI Marine Fisheries Council
David Borden, DEM
Mark Gibson, DEM

(3)

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No. 05-1243

In the Supreme Court of the United States

STEPHEN P. MEDEIROS, PETITIONER

v.

W. MICHAEL SULLIVAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a private citizen has standing to bring a Tenth Amendment commandeering challenge to a federal law that allegedly coerced a State into enacting a state law that governs his conduct, when the State opposes the Tenth Amendment claim and represents that it was not commandeered and that it would leave the state law in place even if the federal law were held to be unconstitutional.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 431 F.3d 25. The memorandum and order of the district court (Pet. App. 18a-33a) is reported at 327 F. Supp. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2005. On March 6, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including March 27, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a fisherman, argues that the federal government impermissibly coerced the State into enacting a state law that regulates the catching of lobsters. The district court held that petitioner lacks standing to pursue that claim, and the court of appeals affirmed.

1. United States fisheries management is guided by principles of cooperative federalism, under which the United States and the States divide and share regulatory authority. In the Atlantic Ocean, fisheries within three miles of shore are principally within the jurisdiction of the Atlantic States Marine Fisheries Commission (the Commission), a body governed by the 15 States bordering that ocean. The Commission was created by an interstate compact approved by Congress in 1942. Act of May 4, 1942, ch. 283, 56 Stat. 267; Pet. App. 45a.

In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (the Atlantic Coastal Act), 16 U.S.C. 5101 *et seq.* (Pet. App. 34a-44a), "to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. 5101(b). Congress found that inconsistent implementation of the Commission's management plans had harmed fish stocks and fishermen in the States that had complied with those plans. See 16 U.S.C. 5101(a); H.R. Rep. No. 202, 103d Cong., 1st Sess. 6 (1993); S. Rep. No. 201, 103d Cong., 1st Sess. 2 (1993).

Under the Atlantic Coastal Act, "[t]he Commission shall determine that a State is not in compliance with the provisions of a coastal fishery management plan if it finds that [a] State has not implemented and enforced [such a plan] within the timeframes established under

the plan or under section 5104 of this title." 16 U.S.C. 5105(a). The Commission shall notify the Secretaries of Commerce and of the Interior of such a determination. 16 U.S.C. 5101(b). The Secretary of Commerce must then determine "whether the State in question has failed to carry out its responsibility under section 5104," and, "if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question." 16 U.S.C. 5106(a).

If the Secretary makes those two findings, he "shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." 16 U.S.C. 5106(c)(1). The Act provides a number of opportunities for a State, the Commission, and the Secretary to resolve concerns about fishery management plan implementation before a moratorium occurs, including opportunities for the States to present their views and meet with the Secretary, and a provision that allows the Secretary to delay a moratorium for up to six months to permit conservation concerns to be resolved. 16 U.S.C. 5106(b) and (c).

2. Following the enactment of the Atlantic Coastal Act, a committee of the Commission drafted a fishery management plan for lobster. Amendment 3 to that plan, which was adopted in 1997, addresses the overfishing of lobster by setting uniform minimum standards for state regulation. Pet. App. 3a. Those standards include range-wide restrictions on lobster size and catch of egg-bearing females, and a number of limits on lobster traps. With respect to "non-trap gear," such as nets, the amendment includes a "100/500 rule," under which 100 lobster a day may be caught with non-trap gear, up to a

maximum of 500 per trip. A.R. 02362-02365; see Pet. App. 3a-4a.[1]

The State of Rhode Island participated in the development of Amendment 3, and voted in favor of the amendment when the Commission adopted it. A.R. 01401-01404. Rhode Island accordingly issued a regulation, known as Regulation 15.18, which implements the 100/500 rule. R.I. Code R. 12 080 012 § 15.18 (2006). See Pet. App. 53a.

After the regulation entered into force, the Rhode Island Marine Fisheries Council voted to rescind it. The Council was a state body composed of eight private citizens (primarily representing fishing interests) and the Director of the State's Department of Environmental Management (DEM). See Gov't C.A. Br. 9. The Director opposed the rescission of the regulation, and both he and the Governor voiced their objections to that decision. A.R. 06331, 06542.

Because the State was no longer in compliance with the interstate fishery management plan, the Commission made a moratorium referral to the Secretary of Commerce. Pet. App. 4a. The State then temporarily reinstated Regulation 15.18 through an emergency rule. See 66 Fed. Reg. 13,444 (2001). The Secretary published a moratorium notification which found that implementation of the 100/500 rule was necessary to the conservation of the resource, and that Rhode Island had

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[1] Those limits were selected because lobster caught in nets are generally bycatch—that is, they are not the principal target of fishing effort. The levels set by the 100/500 rule were intended to be high enough to allow fishermen who catch lobster incidentally as bycatch to retain those lobster. Net fishing targeted directly toward lobster has a number of adverse effects, including significant mortality among young, newly molted lobster. Pet. App. 7a, 9a.

failed to implement it. *Ibid.* The Secretary delayed application of the moratorium, however, to give the State time to make its temporary rule permanent. *Ibid.*

The State subsequently made its reinstatement of Regulation 15.18 permanent, and the Secretary withdrew the moratorium declaration before it was scheduled to go into effect. The state legislature also amended state law to remove all authority from the Council that had rescinded the rule, rendering it an advisory body. R.I. Gen. Laws § 20-3-2 (Supp. 2005). See Pet. App. 4a.

3. Petitioner catches fish with an otter trawl, which consists of a net, a weight that holds the trawl on the seabed, and boards that hold the net open. He brought this suit against the DEM to challenge Regulation 15.18. Petitioner alleged that the regulation violates the Due Process and Equal Protection Clauses of the Constitution because it imposes different restrictions on lobster fishing with trap and non-trap gear. He also alleged that the Atlantic Coastal Act's moratorium provision commandeered Rhode Island to impose Regulation 15.18, in violation of the Tenth Amendment. The United States intervened to defend the constitutionality of the federal statute pursuant to 28 U.S.C. 2403. See Pet. App. 4a, 20a, 23a-24a.

The district court granted summary judgment to respondents. Pet. App. 18a-33a. With respect to petitioner's equal protection and due process claims, the court held that Regulation 15.18 is subject to rational basis review. *Id.* at 26a-27a. Because Regulation 15.18's provision regarding non-trap fishing is "one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality," the Court con-

cluded that the rational basis standard is satisfied. *Id.* at 28a.

As to petitioner's Tenth Amendment claim, the district court held that only state officials, not private parties like petitioner, have standing to contend that a federal law encroaches on state sovereignty in violation of the Tenth Amendment. Pet. App. 30a-32a. The court followed this Court's holding in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority (TVA)*, 306 U.S. 118, 144 (1939), that private parties, "absent the state or their officers, have no standing * * * to raise any question under the [Tenth] Amendment." Pet. App. 30a.

4. The court of appeals affirmed. Pet. App. 1a-17a. After holding that Regulation 15.18 is subject to rational basis review under the Equal Protection Clause, the court concluded that the regulation's restrictions on nets are rational in light of the lobster mortality that nets cause and the possibility that, as finfish become overfished, trawlers will redirect their fishing efforts towards lobster. *Id.* at 5a-6a, 9a-10a. The court applied the same analysis to petitioner's substantive due process claim. *Id.* at 11a-12a.

The court next held that petitioner lacks standing to pursue a Tenth Amendment claim. Pet. App. 12a-17a. The court agreed with the district court that this Court's decision in *TVA* "held that private citizens lack standing to maintain Tenth Amendment claims." *Id.* at 13a. Although petitioner relied on this Court's subsequent decision in *New York* v. *United States*, 505 U.S. 144 (1992), the court of appeals explained that "since *New York* involved a claim asserted only by a state, the question of private-party standing under the Tenth Amendment was never at issue; indeed, the word 'standing' was never

mentioned." Pet. App. 15a. After acknowledging that *New York* observes that the Tenth Amendment "divides authority between federal and state governments for the protection of individuals," *id.* at 14a (quoting *New York*, 505 U.S. at 181), the court of appeals explained that the "specific focus" of that passage is not standing but "whether a state could assert a Tenth Amendment 'commandeering' claim where a previous administration of that state had initially acquiesced in the commandeering," *id.* at 15a.

The court of appeals noted that many courts have followed *TVA*. Pet. App. 16a. It distinguished a Seventh Circuit case that upheld a police officer's standing to pursue a Tenth Amendment claim, *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 702-704 (1999), cert. denied, 528 U.S. 1116 (2000), explaining that in the "specialized circumstances" of that case, "it is debatable whether the plaintiff," a government employee, was "acting in behalf of the state or simply as a private citizen." Pet. App. 16a. The court also described a line of Eleventh Circuit cases as "problematic" because "the Eleventh Circuit's precedent commenced without any reference to *TVA*, and subsequent panels have expressed concern as to whether the omission has resulted in the perpetuation of a circuit precedent inconsistent with TVA." *Ibid.* (citing *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (11th Cir. 2000) (Barkett, J., concurring)).

Finally, the court noted that a re-examination of *TVA* would require consideration of "complex" questions such as "whether [petitioner] should be allowed discovery to determine why Rhode Island officials initially adopted Regulation 15.18, or why those officials reinstated the regulation with dispatch following its brief repeal in 2000." Pet. App. 17a.

ARGUMENT

Petitioner argues (Pet. 8-28) that he has standing to bring a Tenth Amendment commandeering challenge to a federal law that allegedly coerced a State into enacting a state law, even though the State opposes the Tenth Amendment claim, argues that it was not commandeered, and represents that it would leave the state law in place even if the federal law were held to be unconstitutional. The decision of the court of appeals is correct and does not implicate a square circuit conflict. Further review is not warranted.

1. Under this Court's precedents, petitioner lacks standing to challenge an alleged commandeering of the state government. In *Tennessee Electric Power Co.* v. *Tennessee Valley Authority (TVA)*, 306 U.S. 118 (1939), this Court held that only a State may raise a Tenth Amendment claim based on its sovereign interests. In *TVA*, a group of utilities argued that the establishment of the Tennessee Valley Authority constituted "federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.* at 143. This Court held that the utilities lacked standing to sue because "absent the states or their officers," private parties "have no standing * * * to raise any question under the [Tenth] [A]mendment." *Id.* at 144.

Although petitioner contends that *TVA* addressed standing only "in passing" while addressing the merits of the Tenth Amendment claim, Pet. 25 (quoting *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000)), the Court expressly rejected the Tenth Amendment claim on both standing and merits grounds, 306 U.S. at 143-144. As the court of appeals recognized, both rationales (stand-

ing and the merits) are alternative holdings, framed in equally definitive terms, and there is no basis for characterizing one as more authoritative than the other. See *ibid.*; Pet. App. 13a. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).[2]

Although petitioner argues (Pet. 25) that *TVA* is not binding precedent because it also addressed standing to sue under the Ninth Amendment, and this Court has subsequently addressed issues touching on the Ninth Amendment in cases brought by private parties, no Ninth Amendment standing question was raised or considered in those cases. Nor did those cases purport to overrule *TVA*. See *Webster* v. *Doe*, 486 U.S. 592 (1988); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Thus, no inference can be drawn from those cases, which, in any event, did not involve the Tenth Amendment (and only barely involved the Ninth Amendment). See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

Petitioner also errs in contending (Pet. 20-22) that *New York* v. *United States*, 505 U.S. 144 (1992), is inconsistent with *TVA*. As both lower courts emphasized,

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[2] *TVA* did not involve a commandeering challenge, but instead involved a claim that the federal government invaded the sphere of authority reserved by the Constitution to the States. This Court has subsequently limited the scope of such claims under the Tenth Amendment. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). But the claims at issue in *TVA* parallel petitioner's commandeering claim because they involved the extent of a State's reserved sovereignty under the Tenth Amendment; the decision did not turn on the reach of particular enumerated powers under the Constitution.

New York does not address private party standing. Pet. App. 15a, 31a. Instead, it addresses the question whether state officials' consent to a Tenth Amendment violation precludes subsequent state officials from challenging that violation. 505 U.S. at 181-183. The Court held that the State—not a private party—could challenge the violation, notwithstanding its previous consent, because the Constitution "divides authority between federal and state governments for the benefit of individuals," not for the benefit of the States. *Id.* at 181-182.

It by no means follows that private citizens have standing to assert the State's rights. Just as a State's consent does not preclude it from later challenging a violation, so too the federal government is generally not bound by principles of estoppel in light of "the interest of the citizenry as a whole" in the enforcement of the laws. *Heckler* v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). Nonetheless, private citizens do not generally have standing to assert the government's rights in court. Instead, citizens must rely on their elected government officials, be they federal or state officials, to exercise their discretion in determining which claims to pursue. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-833 (1985).

2. Even if this case were not governed by established precedent, petitioner would lack standing to pursue his commandeering challenge. Petitioner is ultimately challenging not the federal statute, which operates only on the State, but the state law that imposes the 100/500 rule he opposes. Even if the federal statute were held to be unconstitutional, petitioner would benefit only if the State chose to exercise its discretion to repeal the state law. The State has repeatedly explained, however, that it chose to implement the 100/500

rule as an act of state policy, that it was not commandeered by the federal statute, and that "the 100/500 limit would remain in place even if the Atlantic Coastal Act were declared unconstitutional" because "Rhode Island has made a legislative and contractual commitment to carry out the Compact and implement the 100/500 landing limit of Amendment 3." Vincent C.A. Br. 14, 27 (State C.A. Br.); see *id.* at 27-34.

a. In those circumstances, petitioner cannot even satisfy the normal standing requirements of injury-in-fact, causation, and redressability, which he concedes apply here (Pet. 26). Although the petition claims that "[t]he court of appeals did not doubt that petitioner satisfied the traditional requirements of Article III standing," Pet. 20; see Pet. 1, the court of appeals did not reach that question, as the petition later concedes, Pet. 25-26. The State has, however, repeatedly stated that it made an independent decision to implement the 100/500 rule based on state policy concerns. See State C.A. Br. 27-34. Based on those representations by the State, there is no reason to believe that an invalidation of the federal statute would have any effect on petitioner. Because "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision,'" petitioner lacks Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

Petitioner's arguments about injury, causation, and redressability largely ignore the critical fact that his conduct is governed by state, not federal, law. The petition argues (Pet. 27), for example, that "[a]ny claim of executive commandeering under the Tenth Amendment would undisputedly be redressable: the individual would

not be required to comply with the state regulation adopted pursuant to the unconstitutional federal mandate." But that would be true only if the State chose to repeal the state law, which it has said it would not do. When a State raises a Tenth Amendment challenge to alleged federal commandeering, it can choose to stop complying with the federal law in the event that it prevails. But when a private party sues based on injury caused by a state law, its ability to obtain redress depends on independent action by the State. Thus, here as in *ASARCO Inc.* v. *Kadish*, petitioner cannot establish standing because whether his "claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors * * * whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see *Allen* v. *Wright*, 468 U.S. 737, 759 (1984) ("chain of causation" is "far too weak for the chain as a whole to sustain * * * standing," where it depended on actions of "numerous third parties" making "independent decisions").

Petitioner's contention (Pet. 28) that the State would likely repeal the state law if the federal law were invalidated ignores not only the State's own representations, but also the events leading up to this litigation. Rhode Island voted for Amendment 3 when it was adopted by the Commission, and it implemented the 100/500 rule by state regulation shortly thereafter. See Pet. App. 21a. Amendment 3's brief repeal resulted from actions of a state commission controlled by private fishing interests that acted contrary to the wishes of the Governor and the Director of the DEM—and that was then stripped of all authority by the state legislature. See Pet. App. 4a;

Gov't C.A. Br. 9. To the extent that some former state officials expressed concerns about the policy basis for the 100/500 rule, they made clear that they intended to pursue their concerns through the Commission's representative processes, which were established by the interstate compact the State voluntarily joined and continues to support. See Pet. App. 55a, 59a-60a.

b. Even if the State had not opposed petitioner's Tenth Amendment claim and had not made clear that it would retain the 100/500 rule if the federal statute were invalidated, petitioner would still lack standing under *TVA* to assert his commandeering claim. The *TVA* rule both protects state sovereignty and reflects the general principle that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). Ordinarily a litigant may represent the rights of third parties (like the State here) only when there is a nexus between the litigant and the third party and "some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991). At a minimum, there is no impediment to the State's ability to protect its rights. The State is free to bring suit against the Commission or the United States, but it has chosen instead to defend the federal and state laws.

Allowing private parties like petitioner to bring Tenth Amendment commandeering challenges would infringe on the sovereignty of the affected States. Here, the State has exercised its sovereign prerogatives by establishing a policy of following its obligations under the interstate compact. The legislature has declared that it is "the policy of the state of Rhode Island to perform and carry out the compact and to accomplish its

purposes," and has directed state officials "to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of the compact in every particular." R.I. Gen. Laws § 20-8-7 (1998). The State has a strong interest in ensuring that the Commission is effective in protecting coastal fisheries and that its neighbors implement the Commission's decisions. Because petitioner's interests are inconsistent with the State's policy "to perform and carry out the compact" in "every particular," *ibid.*, he should not be permitted to pursue a challenge that purports to assert the State's rights in an attempt to achieve a goal that is directly at odds with state policy. In analogous contexts, this Court has been careful to protect States' sovereign interests by holding that when a State elects not to defend the constitutionality of one of its statutes, its citizens lack standing to defend the statute. *Diamond* v. *Charles*, 476 U.S. 54, 64-65 (1986); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65-66 (1997); *Raines* v. *Byrd*, 521 U.S. 811 (1997); *Flast* v. *Cohen*, 392 U.S. 83, 105 (1968).

The intrusion on state sovereignty would be especially great here because in order to prevail, petitioner would have to inquire into the State's motivation for enacting the legislation. Under petitioner's theory of standing, it appears that he would have to prove that the State would likely repeal the state law (notwithstanding its contrary representations) if he were to prevail in this litigation. See Pet. 28; *Lujan*, 504 U.S. at 560-561. And on the merits of petitioner's commandeering claim, "the question might arise as to whether he should be allowed discovery to determine why Rhode Island officials initially adopted Regulation 15.18, or why those officials

reinstated the regulation with dispatch following its brief repeal in 2000." Pet. App. 17a.[3]

Such discovery would be improper, as it would amount to an unwarranted collateral attack by a citizen of Rhode Island on the basis for the State's policy decisions, as well as its position in this litigation. The federal courts have generally avoided intrusion into States' policy decisions and internal administration. See, *e.g.*, *Diamond*, 476 U.S. at 65 (referring to "[t]he concerns for state autonomy that deny private individuals the right to compel a State to sue to enforce its laws"); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984) (holding that courts will not consider a dispute between a State and one of its citizens arising under state law); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976) (describing federal court abstention from deciding "policy problems of substantial public import" within a State). There is even less reason to undertake such an inquiry here, because "it is a contradiction in terms to say that * * * it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper." *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 358 (1909) (Holmes, J.). "The very meaning of sovereignty is that the decree of the sover-

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[3] Petitioner's theory assumes, of course, that asking a State to choose between adoption of a particular state regulation or the imposition of federal regulation constitutes "commandeering" if the State would have preferred a different course. As *South Dakota* v. *Dole*, 483 U.S. 203, 210-211 (1987), makes clear, that is not the law. Congress is free to encourage States to regulate in a manner consistent with federal policy by establishing appropriate disincentives for inaction. The mere exercise of congressional authority to conserve an over-fished species by banning specified fishing activity in the face of state inaction cannot constitute commandeering.

eign makes law," *ibid.*, and here the State, not the federal government, made the law that regulates petitioner's conduct.

If petitioner believes that state officials are eschewing their responsibilities and should not enforce the 100/500 rule, his recourse lies in the State's internal mechanisms of accountability. As the court of appeals explained, "the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." Pet. App. 15a.

c. Although petitioner asserts (Pet. 21-23) that private-party standing to bring Tenth Amendment commandeering claims should be analogized to standing to assert violations of the separation of powers among the three branches of the federal government, petitioner's analogy is inapposite. Adjudication of federal separation-of-powers claims generally requires only a non-intrusive comparison of the divisions of responsibility among the branches as set forth in the Constitution and revealed by historical practice, and the allegedly unconstitutional law generally operates directly on the plaintiff, causing an injury that creates the basis for standing. See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 935-936 (1983) (holding that individual had standing to challenge violation of bicameralism-and-presentment requirement because, if the law were found to be unconstitutional, "the deportation order against [plaintiff] will be canceled," giving him a direct personal stake in the outcome of the challenge); *Buckley* v. *Valeo*, 424 U.S. 1, 117 (1976) (per curiam) (holding that litigants could chal-

lenge composition of commission because it was designated to adjudicate their own rights).

In a commandeering challenge, however, the federal law operates on a State, and a private plaintiff's alleged injury stems from the state action that was allegedly compelled by the federal government. Adjudication of such a claim may not only require a federal court to inject itself into a dispute between a State and one of its citizens on a question of state policy, but also raise intrusive questions of causation and motivation. See pp. 13-16, *supra*. In addition, although it would raise awkward justiciability issues for different branches of the federal government to sue one another, States are independent sovereigns that are quite capable of pursuing legal redress for Tenth Amendment violations. Cf. *Powers*, 499 U.S. at 411 (holding that one party's standing to assert a third party's rights turns in part on whether there is "some hindrance to the third party's ability to protect his or her own interests").

3. Although there is some disagreement among the lower courts about private party standing to pursue some types of Tenth Amendment claims, this case does not implicate a square circuit conflict.

Like the court of appeals below, the Tenth Circuit has held that some private parties lacked standing to pursue their Tenth Amendment challenges. *United States* v. *Parker*, 362 F.3d 1279, cert. denied, 543 U.S. 874 (2004); *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 763 (1980), cert. denied, 450 U.S. 1050 (1981). Only two other circuits, the Seventh and the Eleventh, have considered private party standing to bring Tenth Amendment claims. Although those circuits upheld private parties' standing to bring some Tenth Amendment challenges, the claims in those cases were distinguish-

able from petitioner's claim, and it is not clear that in this case those circuits would reach a different result from the decision below. Most importantly, none of those cases considered whether a private party has standing to bring a commandeering challenge to a federal statute that allegedly regulates a State but not the plaintiff—especially where, as here, the State has separately enacted a state law causing the plaintiff's alleged injury, and expressed an intent to retain that law regardless of the outcome of the commandeering challenge.[4]

a. In *Gillespie*, the Seventh Circuit held that a state police officer had standing to challenge a federal statute, 18 U.S.C. 922(g)(9), that prohibits persons convicted of domestic violence offenses from possessing firearms in or affecting commerce. 185 F.3d at 703. The court explained that plaintiff suffered "a concrete injury—the loss of his ability to carry a firearm, and the consequent loss of his job as a police officer." *Ibid.* "That injury can also be fairly traced to the [alleged] constitutional violation," the court explained, "for if we declared the

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[4] The District of Columbia, Fifth, and Ninth Circuits have found it unnecessary to resolve Tenth Amendment standing questions. *Lomont* v. *O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002); *United States* v. *Brockway*, 769 F.2d 263, 265 (5th Cir. 1985); *Nance* v. *EPA*, 645 F.2d 701, 716 (9th Cir.), cert. denied, 445 U.S. 1081 (1981). Although the petition cites *Lomont* as taking sides on the issue, see Pet. 14, 16, the petition correctly recognizes elsewhere that *Lomont* did not decide the question, Pet. 10-11. Petitioner argues (Pet. 14-15) that other circuits have adjudicated Tenth Amendment claims brought by private parties, but no standing question was raised or considered in those cases. The fact that a case assertedly presents an antecedent legal question, jurisdictional or otherwise, does not mean that a court issues a *sub silentio* ruling on that question by not considering it. See, *e.g.*, *Steel Co.*, 523 U.S. at 91; *NRA Political Victory Fund*, 513 U.S. at 97.

statute unconstitutional, the firearms disability would be nullified and Gillespie would regain his right to carry a firearm." *Ibid.*

As the *Gillespie* court explained, the federal statute at issue in that case (unlike the one at issue here) is "not directed at States or state officials," and is instead "a criminal law of general application" that "regulates the behavior of individuals as individuals." 185 F.3d at 708. Because the federal statute directly regulated the plaintiff, no state legislation was implicated, and the traditional standing requirements of injury, causation, and redressability were clearly satisfied. See *id.* at 703.

In addition, the thrust of the *Gillespie* plaintiff's Tenth Amendment claim was that the statute exceeded Congress's Commerce Clause powers, and therefore infringed on territory reserved to the States. 185 F.3d at 704. There is no question that private individuals can challenge legislation as exceeding Congress's enumerated powers under Article I when the traditional standing criteria are satisfied. Although the plaintiff also raised an insubstantial commandeering claim, the court quickly disposed of it in two paragraphs, *id.* at 707-708, and the court did not expressly address the question whether private plaintiffs have standing to pursue commandeering (as opposed to other Tenth Amendment) claims—especially where, as here, the State opposes the challenge and stands behind the state law on state policy grounds.

Moreover, as the court of appeals noted (Pet. App. 16a), the plaintiff in *Gillespie* was a government employee, a police officer, and there is some question as to whether he should be considered a private or state actor for this purpose. See *Lomont* v. *O'Neill*, 285 F.3d 9, 13

(D.C. Cir. 2002) (finding standing for law enforcement officers to raise Tenth Amendment claim).

b. The Eleventh Circuit cases cited by petitioner (Pet. 11-12) are similarly distinguishable. *Atlanta Gas Light Co.* v. *United States Department of Energy*, 666 F.2d 1359, cert. denied, 459 U.S. 836 (1982), and *Seniors Civil Liberties Ass'n* v. *Kemp*, 965 F.2d 1030 (1992), both involved challenges to federal laws that operated directly on the plaintiffs, not on States. In *Atlanta Gas*, the plaintiffs challenged a federal law that prohibited the distribution of natural gas for use in outdoor lighting. 666 F.2d at 1362. The court explained that the federal law "operates against [plaintiff] local gas distribution companies" and levies fines against them for noncompliance. *Id.* at 1364 n.7; see *id.* at 1368 n.16. Similarly, *Seniors Civil Liberties Ass'n* involved a challenge to provisions of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, that prohibited discrimination by the plaintiffs' condominium complex. 965 F.2d at 1033; see *id.* at 1034 ("nothing in the Fair Housing Act regulates the states as states"). Thus, neither of those cases presented the issues raised here regarding a commandeering challenge based on a State's enactment of state legislation.

In the other Eleventh Circuit decision relied on by petitioner, *Dillard* v. *Baldwin County Commissioners*, 225 F.3d 1271 (2000) (Pet. 12), an intervenor argued that a district court's re-districting order exceeded its authority under the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*, and violated the Tenth Amendment. The court held that voters have standing to challenge an allegedly illegal voting scheme to which they are subject. 225 F.3d at 1274, 1277-1280. In doing so, the court emphasized that "in order to establish standing to bring a Tenth Amendment claim, just as for any other claim, the

plaintiff must show that it suffered an injury in fact caused by the challenged action." *Id.* at 1277. The court also distinguished cases in which individuals sought to bring suit based on distinctly sovereign prerogatives. See *id.* at 1278-1279 (distinguishing *Arizonans*, *supra*, and *Raines*, *supra*). Thus, although the Eleventh Circuit found that a plaintiff had standing to challenge a court-imposed voting scheme, it did not address the question whether a plaintiff would have standing to bring a commandeering challenge to a federal statute in the circumstances of this case.

Moreover, the Eleventh Circuit has expressed doubt about its Tenth Amendment standing cases. See *Atlanta Gas*, 666 F.2d at 1368 n.16 (deciding question in a brief footnote, without citing *TVA*, while admitting that "we must * * * express our uncertainty"); *Seniors Civil Liberties Ass'n*, 965 F.2d at 1034 n.6 (relying on *Atlanta Gas* "with admitted doubts"); *Dillard*, 225 F.3d at 1283 (Barkett, J., concurring) (expressing "reservations" about whether the Eleventh Circuit's decisions "were correct"). The Eleventh Circuit's admitted discomfort with its decisions suggests that it may limit them, and that at a minimum it would be reluctant to extend them to commandeering claims in the circumstances of this case.

c. Petitioner also relies (Pet. 14) on the state court decision in *Guillen* v. *Pierce County*, 31 P.3d 628 (Wash. 2001) (en banc), rev'd, 537 U.S. 129 (2003), which this Court reversed on the merits without reaching the standing question, *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003). In *Guillen*, there was no claim that Congress commandeered the state government. Instead, the Washington Supreme Court's Tenth Amendment analysis focused almost exclusively on whether

there was a Commerce Clause violation. See 31 P.3d at 653-655. As this Court explained, "[r]espondents contend in passing that § 409 violates the principles of dual sovereignty embodied in the Tenth Amendment," but "[t]he court below did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress's enumerated powers." 537 U.S. at 148 n.10 (citation omitted).

Although petitioner emphasizes (Pet. 1-2, 8-9) that this Court granted certiorari on a Tenth Amendment standing question in *Guillen*, he reads far too much into that grant. The Washington court held a federal statute unconstitutional, and this Court granted a petition for a writ of certiorari, which included but was not limited to the standing question, in order "to resolve the question of the constitutionality of th[e] federal statute." 537 U.S. at 140. It does not follow that the standing question independently warrants review, especially with respect to the type of commandeering claim at issue here.

4. As explained above, the decision of the court of appeals is correct and does not implicate a square circuit conflict. Other factors also counsel against further review. The question whether private parties may bring Tenth Amendment commandeering claims has not been extensively analyzed in the courts of appeals. The cases that have addressed private-party standing to bring Tenth Amendment claims largely involved Commerce Clause challenges, and the courts generally did not consider the additional issues that are raised by efforts by private parties to press commandeering claims over the objection of a State that enacted the state law governing those parties' conduct.

In addition, the dispute here is unusual in that it involves petitioner and three other parties—the State, the

Commission, and the United States—and the State voluntarily joined the interstate commission that promulgated the 100/500 rule at issue. As a result, the causation and redressability questions in this case are more complicated than in most others. Those questions were not, however, specifically considered by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

STEPHEN P. MEDEIROS,

Petitioner,

v.

W. MICHAEL SULLIVAN, DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION OF RESPONDENTS W. MICHAEL SULLIVAN AND THE ATLANTIC STATES MARINE FISHERIES COMMISSION

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The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 431 F.3d 25. The district court's opinion (Pet. App. 22a-84a) is reported at 327 F. Supp. 2d 145.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). As we explain below, petitioner lacks standing under Article III of the Constitution.

STATEMENT

Petitioner brought a federal constitutional challenge to a State regulation promulgated by respondent Director of the Rhode Island Department of Environmental Management (DEM) limiting the number of lobsters that may be caught in Rhode Island's coastal waters by fishermen using "non-trap" gear such as "otter trawl" nets drawn through the water by boats. The regulation implements provisions of a fishery management plan issued by respondent Atlantic States Marine Fisheries Commission (ASMFC), an interstate compact organization of which Rhode Island is a member. The court of appeals, affirming the district court, rejected petitioner's due process and equal protection challenges to the measure, and held that petitioner lacked standing to press his claim that its adoption resulted from unconstitutional federal "commandeering" of the State's lawmaking process.

The petition should be denied. First, as demonstrated below, petitioner lacks Article III standing. Although petitioner makes the extraordinary suggestion that this Court may expound on the question he seeks to have answered, leaving it for later determination by another court whether the Constitution's "case or controversy" requirement was satisfied, this Court has an independent obligation to assure itself of its subject matter jurisdiction (and that of the federal courts below). When a petitioner cannot carry his burden of establishing that a dispute presents a "a proper case or controversy, the courts have no business deciding it, or

expounding the law in the course of doing so." *DaimlerChysler Corp. v. Cuno*, 2006 WL 1310731, *6 (2006). Indeed, even if the question of subject matter jurisdiction were closer, these grave doubts would militate powerfully against exercising discretionary review power in this case.

Petitioner overstates the degree of disagreement in the lower courts on whether private parties have standing to assert "Tenth Amendment" claims, a broad category that includes claims that differ significantly in ways relevant to the standing inquiry. Few courts have considered private standing to assert "commandeering" challenges – and none of the cases involved a State law enacted pursuant to an interstate compact, a central feature of this case.

Finally, the First Circuit correctly concluded that petitioner had no standing. That result is supported not only by this Court's decision in *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939), but by more recent decisions concerning prudential limitations on third party standing, limitations that should apply with maximal force where sovereign interests of States are at issue. By their nature, commandeering claims implicate core State interests to an extraordinary degree; transferring to private parties decisions about how and when to bring such claims would harm the very interests the Tenth Amendment aims to protect.

1. Marine fisheries of the United States are regulated under an elaborate complex of federal and State laws. See *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109 (1st Cir. 2002). States have primary authority over fisheries prosecuted in State waters (shore to three miles). Fisheries in federal waters are managed under various statutes, prominently including the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1883, which prescribes a system of federal regulation by regional fishery management councils and the Secretary of Commerce for certain fisheries prosecuted primarily in the federal

"exclusive economic zone" (EEZ) extending from three to 200 miles from shore.

2. More than a half-century ago, the fifteen Atlantic States and the District of Columbia entered into a compact – approved by Congress pursuant to Art. I, § 10, cl. 3, of the Constitution. Pub. L. 77-539 (1942), as amended by Pub. L. 81-721 (1950) – establishing the Atlantic States Marine Fisheries Commission for the purpose of "promot[ing] the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause." ASMFC Compact, Art. I. Each member State appoints three representatives to the Commission: its director of marine fisheries; a State legislator; and a public member with fisheries experience who is appointed by the Governor. Art. III. Art. XII provides that the Compact is to remain in force and binding upon each compacting State until formally renounced by it.

While ASMFC member States retain sovereignty over fisheries within their waters, Art. IX, the Commission develops interstate fishery management plans through species-specific Management Boards (in this instance, its American Lobster Board), whose voting membership is comprised of a delegation from each State with an interest in that fishery. See ASMFC, Interstate Fisheries Management Program Charter, Sec. 4.[1] These plans are implemented severally by each State, typically by the adoption of regulations pursuant to State law. The Commission today coordinates State management of more than 20 Atlantic coastal fisheries covering 25 species.

Rhode Island was an original member of the ASMFC

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[1] The ASMFC Compact, the ISFMP Charter, and the Commission's Rules and Regulations, as well as FMP documents for American lobster and other species, are available on the Commission's website, http://www.asmfc.org.

Compact, and has remained part of the Compact ever since. See also R.I. Pub. L. 1941, ch. 1021, § 1; R.I. Pub. L. 1949, ch. 2360, § 1; R.I. Gen. Laws §§ 20-8-1, 20-8-2. See also R.I. Gen. Laws § 20-8-3 (designating members of Rhode Island delegation to Commission). State law directs "[a]ll officers of the state of Rhode Island * * * to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of the compact in every particular; it being declared to be the policy of the state of Rhode Island to perform and carry out the compact and accomplish its purposes." R.I. Gen. Laws § 20-8-7.

3. By the early 1990s, the Commission had developed fishery management plans for numerous species. In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act, Pub. L. 103-206, 16 U.S.C. §§ 5101-5108 ("ACFCMA"), in order to "support and encourage the development, implementation, and enforcement of effective interstate conservation and management" of "[c]oastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States and of the federal Government[.]" *Id.* § 5101(a)(3), (b). The legislative history reflects Congress's concern that fishermen in States that implemented ASMFC plans were having to "shoulder a disproportionate share of the conservation burden," and that "[i]nconsistent implementation" of plans had contributed to the decline of fish stocks. H. Rep. 103-202 at 6 (1993).

Recognizing that "[t]he responsibility for managing Atlantic coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission," 16 U.S.C. § 5101(a)(3), ACFCMA calls upon the Commission to continue developing "coastal fishery management plans to provide for the conservation of coastal fishery resources," based upon the best available scientific information, in order to "promote the conservation of fish stocks throughout their

ranges[.]" *Id.* § 5104(a)(1), (a)(2)(A). The identification of fisheries warranting protection, and the substance of management plans, are left to the Atlantic coastal States, acting through the Commission.[2]

ACFCMA directs the Department of Commerce, through National Marine Fisheries Service (NMFS), and the Department of the Interior, through U.S. Fish and Wildlife Service, to support the Commission's interstate fishery management program by providing assistance in data collection, habitat conservation, fishery research, law enforcement, and funding for the development of plans and for their implementation by ASMFC member States. See 16 U.S.C. §§ 5103(a), 5107.

The Act also authorizes the Secretary of Commerce, in certain circumstances, to exercise the Commerce Clause power of Congress over fishing in the coastal sea in the event of non-compliance with an element of a ASMFC plan that the Secretary finds is necessary to conservation of the fishery in question.[3] If the Commission notifies the Commerce Secretary that a member State has failed to implement a plan component the Commission has designated "essential," and the Secretary independently determines, both (1) that the State is in default and (2) that the obligation is necessary for conservation of the fishery in question,16 U.S.C. § 5106(a),

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[2] At hearings on the legislation, the ASMFC Chairman, Philip G. Coates – also then Director of Massachusetts' Division of Marine Fisheries – expressed the Commission's support for the legislation and testified that: "This bill – in its entire theory and concept – relies on the good judgment of the states to determine what is necessary for Atlantic coastal fishery resources." Hearing Before the Subcommittee on Fisheries Management of the House Committee on Merchant Marine and Fisheries, H.R. 2134 at 59 (May 19, 1993). See also H.R. Rep. 103-202 at 6 (1993) ("Under the legislation, the Commission and the States continue to be responsible for the management of coastal fisheries."); Sen. Rep. 103-201 at 7 (1993).

[3] ACFCMA was modeled in part on the Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613 (1984), as amended, 16 U.S.C. 5151 *et seq.*, which was widely credited with restoring the striped bass (a.k.a. rockfish) from near extinction.

the Act provides that he declare a moratorium on fishing for the particular species within the coastal waters of the non-complying State. 16 U.S.C. § 5106(c).

4. The American lobster, *Homarus americanus*, supports the most valuable commercial fishery in the northeast United States. Administrative Record "AR" 1576. ASMFC approved its initial interstate fishery management plan for lobster in 1979. AR 46. During the 1980s, the lead responsibility for development of lobster management plans shifted from the States to the federal government through the New England Fishery Management Council. See *Campanale & Sons*, 311 F.3d at 112.

During the 1990s, biologists warned that the lobster stock was overfished and vulnerable to collapse. CA App. 155. In 1996, federal regulators and the ASMFC convened a peer review panel, AR 1514, 1516, which concluded that intense fishing effort had resulted in a truncated age structure for the lobster stock, in which "recruits" to the fishery (young lobster just molting into minimum legal size) comprised the vast majority of landings in most areas. AR 705-706, 721. The depletion of the mature lobster population resulted in a severe diminution in egg production and raised the risk of a stock collapse. AR 721-22, 1535.[4]

5. The Commission adopted Amendment 3 to the lobster management plan in December 1997. AR 48. Unanimously approved by ASMFC member States with lobster fisheries, including Rhode Island, AR 1401-1404, Amendment 3 – for which the administrative record spans thousands of pages – replaces all previous ASMFC lobster management plans and

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[4] After the failure of a proposed federal plan to reduce lobster fishing effort and limiting entry, AR 3184, NMFS issued a final rule in December 1999 transferring authority for lobster management in federal waters from the Magnuson-Stevens Act to the ACFCMA. 64 Fed. Reg. 68228 (Dec. 6, 1999). Under the current arrangement, the Commission has principal responsibility for lobster fishery management, while NMFS is authorized to implement, for federal waters, regulations supportive of the Commission's plan for state coastal waters. See 16 U.S.C. § 5103(b)(1).

amendments. AR 2331-62; CA App. 145. It implements the conclusion of the peer review panel by focusing management efforts on increasing lobster egg production. AR 2360.[5]

Amendment 3 imposes categorical restrictions on lobster size and catch of egg-bearing females. The plan sets forth separate provisions addressing fishing with traps (the gear used for the vast majority of landings) and fishing with "non-trap" gear such as nets. It limits the size and number of traps per vessel and requires an increase in the size of the escape vents in traps for young, small lobsters. AR 2363. As to non-trap gear, Amendment 3 adopts a "100/500" provision, limiting the taking of lobster with non-trap gear to 100 a day, up to a maximum of 500 per trip of five days or more. AR 2362. The100/500 rule thus allows non-trap fishermen who catch lobster incidentally as bycatch to retain those lobsters up to the prescribed limits. AR 94. Section 3.5 of Amendment 3 provides that ASMFC States may retain or adopt measures more stringent than those set out in the plan. CA App. 179.[6]

At the time Amendment 3 was adopted, responsibility for adopting fishery management regulations in Rhode Island was lodged in the Rhode Island Marine Fisheries Council (RIMFC), a body composed of eight private citizens (six from the fishing industry) and the Director of the DEM. See R.I. Pub. Laws 1981, ch. 197, § 3; *Healey v. Bendick*, 628 F.Supp.

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[5] At the time Amendment 3 was approved, lobster egg production had diminished to between one and three percent of what it would be in an unfished stock, far below the 10% level that signals overfishing. AR 3191.

[6] Before the adoption of Amendment 3, Maine, the ASMFC member state with by far the largest lobster fishery, prohibited the catching of lobsters by means other than traps. 12 M.R.S.A. § 6952(1). Maine's "pot only" restriction remains in effect, as do those of two other member states. See N.Y. Env. Cons. Law § 13-0329 (also restricting lobster fishing to traps); 19 Mass. Gen. Laws Ann., ch. 130, § 37 (prohibits the landing of lobsters harvested by mobile gear). See also 6 N.H. Code Admin. R. Ann., Fish. 602.08 (pre-Amendment 3 provision imposing 100/500 limit on landings taken by non-trap gear).

681, 685 & n.3 (D.R.I. 1986).

After the Commission adopted Amendment 3, Rhode Island promptly issued a regulation implementing the 100/500 rule restricting non-trap lobster catch for State jurisdictional waters. AR 6329. Facing sharp opposition from some in the State's fishing industry, however, the RIMFC rescinded that regulation in June 2000. AR 6331. The sole public official on the RIMFC (the designee of the Director of the DEM)), declined to support the rescission, and both the Director and the Governor of Rhode Island objected to the RIMFC's action. AR 06331, 6466, 6542.[7]

Because the State was no longer in compliance with an essential element of a Commision plan, the ASFMC referred the matter to the Secretary of Commerce, who made specific determinations of noncompliance and conservation necessity under 16 U.S.C. 5106(a), and published a moratorium notification. 66 Fed. Reg. 13,443 (Mar. 6, 2001). The Secretary observed, however, that Rhode Island had temporarily resumed implementation of the 100/500 rule, and accordingly delayed implementation of the moratorium. *Id.* at 13,444. On March 28, 2001, the State, through the DEM, made the 100/500 rule permanent. See R.I. Code Reg. 12.080.012.15.18 ("Regulation 15.18"). The Secretary thereupon withdrew the moratorium declaration, which never went into effect.

In July 2001, Rhode Island's legislature enacted a statute

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[7] While Director Reitsma questioned the conservation basis for the 100/500 restriction, he preferred to "follow the [ASMFC] amendment process" to address his concerns, AR 6735, and considered the unilateral rescission of the provision, which he declined to sign, as "inconsistent with his responsibilities as Director to administer the provisions of an operational and recognized fishery management plan." AR 6542. Explaining the rescission to the ASMFC Lobster Board, Mr. Gibson of the Rhode Island DEM stated: "I would just add that it was rescinded over the objection of my Division and the Department." *Ibid.* Another Rhode Island representative explained that the concern animating opposition to the 100/500 rule was non-trap fishermen's sense that it discriminated against them, *id.* – a claim petitioner urged below, but has abandoned.

providing that the RIMFC (the body that had rescinded the rule) "shall serve in an advisory capacity only," and expressly divesting it of all regulatory authority over matters of fish, lobster, and shellfish management. R.I. Pub. Laws 2001, ch. 304, § 2, codified at R.I. Gen. Laws § 20-3-2(a). Responsibility for fisheries regulation is now reposed under State law with the Department of Environmental Management. R.I. Gen. Laws § 20-1-2.

In response to the Rhode Island delegation's request that it revisit the 100/500 limitation, the Commission in 2001 approved for public review Amendment 4 to the lobster plan. AR 4201, 7824. This proposal emerged from the formal public procedure available within ASMFC to amend a previously agreed interstate fishery plan, and would have, *inter alia,* authorized States to substitute alternative measures for 100/500 limit if the alternative was found by ASMFC to provide equivalent conservation benefits. AR 7839. Draft Amendment 4 was approved for public review and issued for public comment. AR 7824. After extensive public procedure in which an ASMFC lobster technical committee and a lobster industry advisory group, as well as the vast majority of public commenters, urged that the 100/500 limit not be amended, in August 2002 the ASMFC Lobster Board tabled the proposal indefinitely. AR 6387-7757, 7844-7955.

7. Petitioner catches fish with an otter trawl, a conical net usually used for fishing at or near the ocean floor. He catches lobster as bycatch, incidental to his pursuit of other species.

Petitioner filed suit against the Rhode Island Department of Environmental Management in Rhode Island Superior Court to challenge Regulation 15.18. He alleged that Regulation 15.18 violated State law and the Due Process and Equal Protection clauses of the United States Constitution because it imposed different restrictions on lobster fishing with trap and with non-trap gear. After the State removed the case to federal court, petitioner amended his complaint to add a claim that Rhode Island's adoption of the regulation resulted from impermissible "commandeering" by means of

ACFCMA's moratorium provision, in violation of the Tenth Amendment. Petitioner's amended complaint named the ASMFC as a defendant. The United States intervened under 28 U.S.C. 2403 to defend the constitutionality of ACFCMA.

The district court granted summary judgment for defendants. Rejecting petitioner's claim under the Equal Protection Clause, the court held that the 100/500 limit was rationally related to the legitimate government purpose of rebuilding the depleted lobster stock, and that it functioned as "one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality." Pet. App. 28a. The court also rejected petitioner's claim based on the Due Process Clause, concluding that petitioner had failed to "distinguish his due process claim from his equal protection argument" and that his pleadings were "silent as to the basis for his due process claim." Pet. App. 26a. Finally, the district court held that, under *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), petitioner lacked standing as a private party not aligned with the State to bring a Tenth Amendment commandeering challenge.

The First Circuit affirmed. It ruled that there was a rational basis for the 100/500 rule for purposes of the Equal Protection Clause, and that, because no fundamental right was at stake, petitioner's substantive due process claim failed on the same ground. Pet. App. at 10a-12a. Like the district court, the court of appeals ruled that petitioner lacked standing to press his Tenth Amendment commandeering claim. The court determined that *Tennessee Electric* was binding on this point, and had not been overruled in *New York v. United States*, 505 U.S. 144 (1992). Pet. App. 13a-15a. The court was "particularly reluctant to second-guess the continuing vitality" of *Tennessee Electric* given what it regarded as difficult questions about "how a private citizen proceeds to establish a Tenth Amendment 'commandeering' claim where the State itself has acquiesced in the federal-state arrangement." Pet. App. 17a.

REASONS FOR DENYING THE PETITION

Petitioner requests that this Court review whether there is a "categorical[] prohibit[ion]" (Pet. i) against private party standing to assert Tenth Amendment "commandeering" claims. But, whether or not there is any such categorical rule, petitioner lacks Article III standing in this case. The Rhode Island fisheries regulation that is the source of petitioner's asserted injury was enacted pursuant to the State's commitments under the ASMFC Compact and under State law, and would remain in place even absent the provisions of federal law that petitioner attacks. Petitioner cannot satisfy the redressability requirement of Article III.[8]

Though the absence of Article III standing is dispositive, the question presented does not warrant this Court's review in any event. Although there is some disagreement among the courts of appeals concerning whether or when private parties may assert "Tenth Amendment" claims, it is neither as broad nor as deep as petitioner suggests, and there is no clear indication that any other court would have decided this case any differently. The ruling below was consistent with this Court's recent reaffirmation in *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004), that standing to assert the constitutional rights and interests of others is proper only in exceptional circumstances, a reaffirmation that will guide future courts' consideration of the seldom scrutinized question petitioner asks this Court to review.

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[8] Though respondents' brief pointed out the lack of redressability, the court of appeals did not address petitioner's Article III standing to assert his commandeering claim. (The district court ruled that petitioner had alleged injury in fact, but did not address causation or redressability. Pet App. 29a.) In any event, of course, this Court has an independent "'obligation to assure'" itself that Article III requirements are satisfied. *DaimlerChysler Corp.*, 2006 WL 1310731, *6 (citation omitted). See also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." (citing, *inter alia*, *Juidice v. Vail*, 430 U.S. 327, 331-32 (1977)).

1. "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler*, 2006 WL 1310731, *6 (citations and internal quotation marks omitted). Article III requires, as an "irreducible constitutional minimum," that a claimant demonstrate not only an injury in fact, but also that the injury is "'fairly * * * trace[able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court,'" and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 41-43 (1976)). These latter requirements are often readily satisfied when "the plaintiff is himself an object" of the challenged governmental action. 504 U.S. at 561. "When, however, as in this case,

> a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well. The existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see also *Simon*, *supra*, 426 U.S., at 41-42[.]

Defenders of Wildlife, 504 U.S. at 562. See also *DaimlerChrysler*, 2006 WL 1310731 at *8 (taxpayers lacked standing to challenge tax exemptions where claimed injury

turned on assumptions about state officials' exercise of "policy judgment" concerning use of tax revenues).

Petitioner cannot carry his "burden of * * * showing that those choices * * * will be made in such manner as to * * * permit redressability of injury." *Defenders of Wildlife*, 422 U.S. at 505. His alleged injury is the restriction on his ability to "catch and sell lobsters in excess of the regulatory limits," Pet. 5, imposed by Rhode Island law. Having now abandoned any contention that Regulation 15.18 violates constitutional limitations applicable to the State, petitioner's sole surviving claim is that he has suffered as a result of what he views as ACFCMA's impermissible commandeering of State fisheries managers who, in turn, have imposed a regulatory burden on him. To show his alleged injury is causally traceable to the constitutional defect claimed – and that the injury would be redressed by a favorable decision on the merits – "it becomes the burden of [petitioner]," to show that it is "likely," were the federal ACFCMA held unconstitutional, that either (1) the Commission itself would remove the 100/500 limitation from its lobster management plan, leading the State to relax its "non-trap" restriction, or (2) Rhode Island would choose to disregard the ASMFC plan and unilaterally rescind Regulation 15.18.

Petitioner has not made – and could not make – any such showing. Since petitioner's current claim is not that *the Commission* or *Rhode Island* have somehow violated the Tenth Amendment, both ASMFC and the State here are "independent actors," who have "unfettered" discretion to exercise their "policy judgment" concerning the management of fisheries in State jurisdictional waters. See *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (noting that a State has "broad regulatory authority to protect * * * the integrity of its natural resources"). See also *DaimlerChysler*, 2006 WL 1310731 at *8 (standing precluded by State officials' "policy judgment" that would leave them free to respond to judicial decision in manner that did not benefit plaintiff) (citation omitted). Petitioner has not identified any constraint in

federal law that prevents the Commission and Rhode Island from managing the lobster harvest in State waters according to their respective compact and State law commitments and their policy judgment, nor anything that would require them to alter the 100/500 rule, regardless of whether the federal moratorium provision were struck down. In fact, owing to Rhode Island's commitment to its sister States, there is every reason to expect the 100/500 limit would remain in place.

Petitioner's effort to depict Regulation 15.18 as a federal mandate overlooks Rhode Island's commitments to the Commission and the other ASMFC States, which are independent of (and predate) ACFCMA. In 1941 the Rhode Island legislature "authorized and directed" the Governor to execute the Atlantic States Marine Fisheries Compact. R.I. Gen. Laws § 20-8-1. Under the Compact, "[t]he contracting states solemnly agree" to the compact purpose, namely, "to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries * * * *" *Ibid.* The Rhode Island legislature directed all State officers "to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of the compact in every particular," and declared it "the policy of the state of Rhode Island to perform and carry out the compact and accomplish its purposes." R.I. Gen. Laws § 20-8-7. Implementing the Compact, the ASMFC member States adopted the Commission's Interstate Fisheries Management Program Charter, which provides in part: "All [member] states are responsible for the full and effective implementation and enforcement of fishery management plans within areas subject to their jurisdiction." ISMFP Charter, Sec. 7(a).

Petitioner has shown no "likelihood" that the Commission will choose to eliminate or relax the 100/500 requirement, which was adopted unanimously after an exhaustive inquiry into the depleted lobster fishery, and reaffirmed after thorough reconsideration in connection with proposed

Amendment 4. *Supra*, pp. 6-8.

Nor has petitioner begun to show it to be likely that, absent the possibility of a federal moratorium, the State would choose to disregard the ASMFC plan's 100/500 requirement by rescinding Regulation 15.18. Rhode Island has been a member of the ASMFC Compact since its inception, and takes seriously its obligations to its other compacting States under the Compact and the ISMFP Charter, as well as its obligation under State law to "carry out the compact and accomplish its purposes." R.I. Gen. L. § 20-8-7.[9]

The Commission lacks coercive power over member States. The member States, however, have committed *inter se* to adhere to the provisions of coastal fishery management plans. They have done so because they perceive a benefit from the "coordinated exercise" of their respective police powers, see Compact, Art. IV, to enhance the health and protect the value of shared coastal fisheries. Because States secure real long-run resource management benefits from the cooperative interstate program the Compact facilitates, their commitment to comply with ASMFC plans extends to instances in which a given State's own representatives on the Commission might have favored a different result. Here, as noted, the compacting States' vote to adopt Amendment 3 was unanimous. AR 1401-1404.

Petitioner's intimation that Rhode Island would, in fact, rescind its 100/500 rule absent ACFCMA's moratorium provision depends upon treating the RIMFC's private citizen appointees – whose role under State law is now purely advisory – as a truer exponent of State policy than the State

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[9] Petitioners obliquely recognize the State's distinct compact obligations, asserting that the state "cannot single-handedly change Commission policy," and may be "hesitant to challenge the Commission" for fear of "reprisals." Pet. 24. But not only is petitioner's intimation of coercion on the part of the Commission entirely unsupported, but he has never asserted any claims attacking Rhode Island's participation in the Commission (claims that would have themselves presented serious private standing problems).

Legislature itself. But see R.I. Const., Art. VI, Sec. 2 (vesting "the legislative power" in the General Assembly). And identifying occasions in which some State officials debated the 100/500 limitation's policy merits is a far cry from demonstrating that the State would choose to disregard its obligations under the ISMFC Charter to fully implement and enforce Amendment 3.[10]

The General Assembly's decision to strip the RIMFC of regulatory authority and give it a role that is "advisory only" – a step that went far beyond anything required to avoid the possibility of a federal moratorium – sets in relief petitioner's inability to show "that relief is likely to follow from a favorable decision here[.]" *ASARCO*, 490 U.S. at 615 (plurality opinion of Kennedy, J.). That 2001 legislation makes all the more implausible any suggestion that striking down the federal moratorium provision would set in motion a State-law process that would ultimately free petitioner from the obligation of Regulation 15.18. Not only does petitioner's argument for redressability ask the federal courts improperly to "assume a particular exercise of the state's [resource management] discretion," *DaimlerChrysler*, 2006 WL 1310731 at *9, but the specific assumptions he asks the courts to make are, in the circumstances here, extremely improbable.

2. Petitioner's discussion of Article III standing (Pet. 25-28) is largely addressed to the abstract question whether, in principle, private commandeering claimants could satisfy the

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[10] Both the Governor of Rhode Island and the Director of the DEM strongly objected to the decision, one supported solely by the private citizen appointees to the RIMFC. AR 6331, 6542. The controversial nature of the RIMFC's action within Rhode Island's government was described by ASMFC Commissioner Gibson of Rhode Island, who explained that, despite that opposition, "our Council moved ahead, anyway. Evidently, there is a procedural way in which a majority of the Marine Fisheries Council who had supported the action [*i.e.*, the rescission of the 100/500 rule] can in fact file a regulation with the Secretary of State without the Department's support. That, in fact, was done, and it just appeared June 29th." AR 6542.

constitutional test for standing. But the immediate question is not whether a private commandeering claimant will ever be able to satisfy the tripartite Article III test, but whether petitioner has done so in this case. He has not.

Petitioner asserts (Pet. 27) that redressability "poses no barrier" in privately prosecuted commandeering suits because "the individual would not be required to comply with the state regulation adopted pursuant to the unconstitutional federal mandate." Here, however, as we have shown, Regulation 15.18 is independently grounded in Rhode Island's commitments under the ASMFC Compact and State law, and redress for petitioner depends upon implausible assumptions about how the Commission and the State would exercise their unfettered discretion. Similarly, petitioner asserts that "invalidation of federal law would preclude enforcement of that law by state executive officials," Pet. 27, a point that has no relevance to this case, which does not involve State enforcement of any federal law. Petitioner's discussion again ignores the interstate compact context in which Rhode Island fisheries management operates.

Petitioner also argues that the Article III standing question "could be addressed" on remand after the Court rules on the question presented in the petition. Pet. 26. This Court's decision in *Kowalski*, 543 U.S. at 128, indicates that the Court may, consistent with *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), assume that Article III standing is proper and proceed to order dismissal for lack of third-party standing (among other "threshold" grounds, see *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). But the propriety of *dismissal* on an alternative threshold ground does not legitimize ruling on and then remanding a case in which Article III standing is lacking – a course of action that bears hallmarks of an advisory opinion. None of this Court's decisions holds that the Court may assume Article III standing when the record and governing law affirmatively proclaim it to be lacking.

Nor is petitioner correct (Br. 27-28 n.11) to suggest that

recognizing the lack of Article III standing in his case would deprive any party of standing in commandeering cases. When a federal statute directly imposes obligations upon the plaintiff – a condition that will by definition be satisfied in most commandeering cases at least as to State plaintiffs – causation and redressability will be more readily established, see *Defenders of Wildlife*, 504 U.S. at 561, because the challenged federal statute will be the very cause of plaintiff's injury-in-fact, and a decree invalidating the statute will remedy the burden. That was the case in *New York v. United States*, which resulted in a decree freeing the plaintiff State from the burden of a federal obligation to "take title" to radioactive waste, 505 U.S. at 176-77,[11] and in *Printz v. United States*, 521 U.S. 898, 933 (1997), which freed the

[11] Petitioner errs in arguing (Pet. 20-21) that *New York* supports private standing to assert a commandeering claim. In that case, the State was pressing its own objection to a federal statutory imposition, and the Court's opinion does not address private standing. *New York*'s explanation that the ultimate aim of Tenth Amendment federalism limits – like the ultimate aim of many legal provisions – is the "protection of individuals," 505 U.S. at 182, does not make the Amendment's prohibition against commandeering enforceable (over the opposition of the relevant State) at the behest of private citizens or -taxpayers. Protection of individuals is no less the ultimate object of the constitutional provisions at issue in *Ex Parte Levitt*, 302 U.S. 633 (1937) (prohibition on appointment of members of Congress, during their elected term, to federal office for which pay was increased during term, Art. I, § 6, cl. 2), and *United States v. Richardson*, 418 U.S. 166, 168 (1974) (Accounts Clause, Art. I, § 9, cl. 7). *New York*'s confirmation that State officials' ability to assert a commandeering claim is not foreclosed by the acquiescence of their predecessors, see 505 U.S. at 181-83, *enhances* States' ability to protect their distinctive interests as sovereigns, cf. *Beers v. Arkansas*, 61 U.S. 527, 530 (1858) (state legislature may withdraw waiver of Eleventh Amendment immunity), whereas petitioner's rule would weaken that ability. Indeed, *New York* itself illustrates that petitioner's expansive rule of private standing is unnecessary – the people of the State through their elected officials took issue with, and overturned, the federal imposition. And while *New York* rejected a broad rule of waiver, it expressly reserved judgment whether estoppel might be appropriate in cases involving interstate compacts. See 505 U.S. at 183.

plaintiff sheriff from federal record-keeping obligations imposed on him under a federal gun control statute. Here, however, the plaintiff is regulated only by State law, and there are compelling reasons to believe that State law would remain in place, regardless of the fate of plaintiff's federal commandeering claim, owing to the independent policy discretion of nonfederal governmental actors.

FEC v. Akins, 524 U.S. 11 (1998) (cited in Pet. 27), in no way supports petitioner's standing here, either. *Akins*' standing analysis relied on the familiar principle of federal administrative law that a party may challenge an agency decision reached on allegedly unlawful grounds, even though the agency might on remand reach the same result through a proper route. *Id.* at 24 (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). Nothing in *Akins* purported to relax the settled rule that when the redress for the plaintiff depends upon the choices of independent actors, the plaintiff must demonstrate a likelihood that those others would act in such a way as to redress the injury – a showing that is extremely difficult to make when, as here, those other actors enjoy unfettered policy discretion. See *DaimlerChysler*, 2006 WL 1310731 at *8-*9.

3. Even if within this Court's Article III power to resolve, the private party standing issue would not warrant this Court's review. While several lower courts have voiced differing views on whether or when a private party may bring a "Tenth Amendment" claim, any division is not deep or clearly defined. The few cases in which standing has been recognized are distinguishable from the instant case, and there are good reasons to allow the lower courts to consider the matter further before this Court takes up the issue.

In addition to the First Circuit in the decision below, the Tenth Circuit has concluded, based in part on *Tennessee Electric*, that private parties lack standing to raise Tenth Amendment claims. See *United States v. Parker*, 362 F.3d 1279, 1284-85 (10th Cir.), *cert. denied*, 125 S. Ct. 88 (2004); see also *Mountain States Legal Foundation v. Costle*, 630

F.2d 754, 761 (10th Cir. 1980) ("Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment.") (citing this Court's discussion of third party standing in *Duke Power Co. v. Carolina Env'l Study Group, Inc.*, 438 U.S. 59, 80 (1978)). Other courts of appeals have also suggested in dicta that private standing is lacking. See *United States v. Brockway*, 769 F.2d 263, 265 (5th Cir. 1985) (calling it a "doubtful assertion" that defendant "possesses standing to assert the state's tenth amendment complaint"); see also *Gaubert v. Denton*, 1999 WL 350103 *5 (E.D. La. 1999) (denying standing based upon *Tennessee Elec.*), *aff'd without op.*, 210 F.3d 368 (5th Cir. 2000); *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981) ("insofar as the tenth amendment is designed to protect the interest of states qua states," private standing "may be seriously questioned").

On the other side of the putative split, the Eleventh Circuit has thrice held that private parties do have standing to assert Tenth Amendment claims. However, two of those cases involved no "commandeering" claim, instead addressing claims by directly regulated private parties that the federal government had exceeded the substantive limitations imposed by the Tenth Amendment. See *Atlanta Gas Light Co. v. United States Dep't of Energy*, 666 F.2d 1359, 1368 (11th Cir.) (challenged "regulations * * * are directed not to the 'States as States,' but rather to the wholly private natural gas distribution industry"), *cert. denied*, 459 U.S. 836 (1982); *Seniors Civil Liberties Association v. Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992) (rejecting Tenth Amendment challenge to "federal 'regulation of *private* activities affecting interstate commerce'") (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S 264, 292 (1981); emphasis added by 11th Circuit).

The distinction is pivotal both because (as explained above) direct regulation does not raise issues of causation and redressability that "commandeering" objections present, and because such claims are inherently different from "commandeering" claims. A commandeering claim rests not

upon the principle that Congress categorically lacks power over the subject matter in question, but instead that, by requiring States to enforce federal law, Congress has exercised power in a manner that infringes their structural autonomy. See *New York*, 505 U.S. at 155-60. See also *id.* at 159 ("Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste.") Commandeering claims are uniquely about the machinery of State government, and necessarily turn on a probing analysis of the often complex relationships between State and federal institutions. See Pet. App. 17a. Unlike the enumerated powers variety of "Tenth Amendment" claim, commandeering claims necessarily involve a State whose sovereignty is alleged to have been affronted; that private parties may challenge on enumerated powers grounds federal laws directly regulating them does not establish that they may sue to vindicate a State's right to be free of federal commandeering.[12]

Moreover, in each of the three 11th Circuit cases embracing the private standing rule, the court expressed significant doubts about its soundness. *Atlanta Gas Light Co.*, 666 F.2d at 1368 n.16 ("express[ing]" court's "uncertainty" about decision to recognize private party standing); *Seniors Civil Liberties Association*, 965 F.2d at 1034 n.6 (recognizing private standing, despite "admitted doubts," because court had done so in *Atlanta Gas*); *Dillard*, 225 F.3d at 1277 (recognizing private standing, but adding that "even if a

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[12] The other Eleventh Circuit case was not a proper commandeering case either. In *Dillard v. Baldwin County Com'rs*, 225 F.3d 1271, 1281 (11th Cir. 2000), private intervenors sought to challenge, on "Tenth Amendment" and other grounds, "the allegedly unconstitutional decision by a federal district court to alter the size of a local governing body." The court rested its decision to recognize "Tenth Amendment" standing on the two earlier circuit decisions, but also found that the private intervenors would have standing under the Voting Rights Act to object to the injunction. *Id.* at 1276-77. See also *Dillard v. Baldwin County Com'rs*, 376 F.3d 1260 (11th Cir. 2004).

private plaintiff's standing to assert a Tenth Amendment claim were contingent upon its having standing to assert some other constitutional or statutory claim," test was satisfied because plaintiffs had standing to assert claim "under Section 2 of the Voting Rights Act"); *id.* at 1283 (Barkett, J., concurring) (expressing "reservations" about whether *Atlanta Gas* and *Seniors Civil Liberties Ass'n* were correctly decided). In none of those cases has that court of appeals itself actually addressed the effect of *Tennessee Electric* – the only mention is in a concurrence in the most recent of the cases in which one judge expressed concern about the inconsistency of the circuit's rule with that decision. *Id.*

Guillen v. Pierce County, 144 Wash.2d 696, 730-731, 31 P.3d 628, 648 (Wash. 2001), *rev'd in part*, 537 U.S. 129 (2003), likewise involved a claim that a federal statute exceeded the scope of the powers delegated to Congress under Article I of the Constitution.[13] As the United States noted in *Pierce County*, U.S. Br. at 24-25 (No. 01-1229), private plaintiffs who can satisfy Article III requirements have standing to assert "enumerated powers" challenges to federal statutes and regulations directly affecting them, whether or not those challenges are cast in "Tenth Amendment" terms. In contrast, a rule allowing private parties to set themselves up as "private attorneys general" for nonconsenting States would itself offend principles of State autonomy, dignity, and independence – in ways that allowing private parties directly affected by federal statutes to enforce the categorical limitations of Art. I, Sec. 8, does not.

Petitioner highlights the Seventh Circuit's decision in

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[13] Petitioner overstates the significance of the Court's grant of certiorari on the standing issue in *Pierce County*. In that case, the Supreme Court of Washington had struck down a federal statute, creating a prototypical need for this Court's review. See 537 U.S. at 140 ("We granted certiorari to resolve the question of the constitutionality of this federal statute."). The Court's decision to grant certiorari on the separate standing question may be less significant than had the Court granted it as a free-standing issue.

Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), which did embrace private party standing, concluding that this Court's discussion in *Tennessee Electric* was mere dictum. 185 F.3d at 700-703. But *Gillespie*, unlike this case, involved a federal statute that, by prohibiting individuals with domestic violence convictions from possessing firearms, directly regulated the plaintiff. And although plaintiff in *Gillespie* characterized his claim as involving alleged commandeering, his contention that Congress lacked power to ban him from possessing a firearm more closely resembled a conventional "enumerated powers" challenge, see *id.* at 705-706. (Indeed the Seventh Circuit disposed of the claim on the ground that a law of general applicability does not raise "Tenth Amendment" concerns merely because it incidentally burdens a State officer.) It remains to be seen whether the Seventh Circuit would approve private standing to attack a statute that did not directly regulate the plaintiff. Furthermore, the *Gillespie* opinion strongly suggests that the Seventh Circuit would recognize the lack of *Article III* standing in a case like this one. *Id.* at 703 (plaintiff's injury "the loss of the ability to carry a firearm, and the consequent loss of his job as a police officer * * * * can also fairly be traced to the constitutional violation that he attributes to Congress in enacting the amendments to the statute, for if we declared the statute unconstitutional, the firearms disability would be nullified and Gillespie would regain his right to carry a firearm.").[14]

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[14] Petitioner also seeks to invoke various decisions in which courts of appeals "reached the merits of private parties' Tenth Amendment claims" without discussing standing, see Pet. 15 & nn.7,8 – suggesting that because these cases were decided after *Steel Company*, they can be tallied as having *sub silentio* approved private party Tenth Amendment standing. *Steel Company*, however, expressly approves the practice of assuming *prudential* standing, as distinct from Article III standing, in order to resolve a case on the merits. See 523 U.S. at 97 (citing *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974)). All of the decisions cited in petitioner's footnotes 7 and

And in no case petitioner cites or of which we are aware of has a court found standing – let alone private party standing – to raise a "commandeering" objection to a statute or law adopted to fulfill obligations under an interstate compact. See *New York*, 505 U.S. at 183 (reserving judgment whether *State* might be estopped from raising 10th Amendment claim after entering into compacts) (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35-36 (1951) (Jackson, J., concurring)).

Simply put, there is no genuine conflict of authority as to whether the question on which this Court's review is sought, namely, whether a "commandeering" claim may be privately pursued. The relatively few decisions on private "Tenth Amendment" standing have arisen in widely disparate contexts, differing in ways highly relevant to the propriety of allowing private standing. If a clear and consistent disagreement should arise – if petitioner is right that the cases "arise frequently," Pet. 18 – the Court will have ample time to address it, presumably in a case lacking the distinct complications peculiar to the interstate compact setting and lacking the fatal Article III problems presented here.

4. *Tennessee Electric*'s rule against private party standing, 306 U.S. at 144, although enunciated tersely and prior to the elaboration of the modern law of Article III standing, is supported by this Court's more recent jurisprudence concerning the proper role of federal courts. Although petitioner labors to demonstrate that private parties are within the "zone of interests" protected by the Tenth Amendment anti-commandeering principle, that is not the only or even the primary prudential standing principle vindicated by the *Tennessee Electric* rule.

As this Court has recently reaffirmed, federal courts have long disfavored claims premised "on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499

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8 in which petitioner suggests standing was implicitly recognized went on to reject the "Tenth Amendment" claim (many of them not commandeering claims) on the merits.

(1974). The basic reasons for this rule – "the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them," *Duke*, 438 U.S. at 80 (citation omitted) – apply with far greater force when a State resident seeks to enlist a federal court to relieve him of obligations imposed by a State whose "sovereignty" he purports to vindicate. See *Mountain States Legal Foundation*, 630 F.2d at 761.

These concerns have special force when the party whose rights and interests being asserted by another is a sovereign State. States have a strong interest in ensuring that, when commandeering claims are asserted, they are brought by parties with the incentive, resources, and ability to press such claims effectively. Allowing private parties to bring these claims, which by definition directly implicate the State's sovereign interests, strips States of the ability to decide when and in what circumstances to initiate these highly consequential suits on federal-state relations, and diverts State resources (whether the State is a defendant or intervenes to protect its interests). It bears noting, in this regard, that in not one of the petitioner's privately prosecuted commandeering cases did the plaintiff actually prevail on the merits. There is no indication that States are withholding meritorious claims – and not basis to accept petitioner's suggestion that States be treated as presumptively "corrupt[ed]" (Pet. 23) – and a rule that invites unmeritorious private suits, often against the States, would ill serve federalism.

And while an unsuccessful privately prosecuted commandeering claim should not have preclusive effect in a subsequent commandeering action brought by the State – at least if the affected State managed to remain a stranger to the private suit – such decisions would have *stare decisis* effect, impairing the State's ability to assert such claims in the forum, at the time, and on the record of its choosing. Adhering to a prudential rule reserving to States and their officers standing to press such claims serves to protect the

resources and discretion of the entities at the core of the Tenth Amendment's concern, and is more consistent with preserving robust constitutional protection for State sovereignty.[15]

Indeed, this case does not even satisfy the limitations imposed in run of the mine third party standing cases. As explained in *Kowalski*, while the rule against third party standing is not "absolute," the Court has

> limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Second, we have considered whether there is a 'hindrance' to the possessor's ability to protect his own interests. *Ibid.*

543 U.S. at 130. Outside these narrow exceptions, the Court has "not looked favorably upon" third-party standing. *Ibid.*

These standards are not satisfied in commandeering cases like this one. Petitioner, as a private citizen, cannot claim a "close" relationship with the State of Rhode Island. Cf. *Kowalski*, 543 U.S. at 130-32. Nor is there any apparent "hindrance" preventing a State or its subdivision that believes it has been unconstitutionally commandeered from itself repairing to court. See Pet. 18 (citing commandeering cases

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[15] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (cited in Pet. 28), does not help petitioner. Plaintiff there sued to vindicate an individual right under the Equal Protection Clause to compete on an equal basis with other applicants free of purposeful racial discrimination. See *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 667 (1993). But there is no individual right to be free of State laws that are the alleged product of federal commandeering. See *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (confirming that "'generalized interest of all citizens in constitutional governance,'" or "'an asserted right to have the Government act in accordance with law,'" do not suffice for standing) (quoting, respectively, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974), and *Allen v. Wright*, 468 U.S. 737, 754 (1984)).

brought by State entities). State and local governmental bodies typically have the resources and legal staff to present such challenges vigorously and effectively, cf. *Kowalski*, 543 U.S. at 142-43 (arguing that indigent criminal defendants denied counsel on appeal faced "hindrance" warranting third-party standing for prospective appellate counsel) (Ginsburg, J., dissenting).[16] States' ability to assert such claims is protected by *New York*'s rule that commandeering claims are not forfeited by State officials' prior acquiescence – a rule that preserves the State electorate's continuing role in protecting the State's sovereign prerogatives.

However much the anti-commandeering principle may ultimately benefit all persons, see *supra*, n. 11, the State's "rights" and "interests" – its meaningful control over the machinery of its government – are the unique and defining gist of a commandeering claim.[17] For that reason, recognizing private party standing would impair, rather than advance, the principles of federalism that the Tenth Amendment embodies. As explained above, private standing would diminish States' control over (and potentially even their ability to prevail upon) the vindication of sovereign

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[16] Neither does this case involve a situation in which "'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U.S. at 568 (quoting *Warth*, 422 U.S. at 510 (citing, inter alia, *Doe v. Bolton*, 410 U.S. 179 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)), and citing *Craig v. Boren*, 429 U.S. 190 (1976) (emphasis added in *Kowalski*)).

[17] Petitioner's analogy to separation-of-powers cases (Pet. 22-23) is inapt. Standing for private parties directly affected by a federal law asserted to violate the separation of powers may be necessary to enforce the proper allocation of authority among components of a unitary government (represented in court by one of the competing branches). See *Raines v. Byrd*, 521 U.S. 811, 829-830 & n.2 (1997); *Bender*, 475 U.S., at 544 ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take"); *United States v. Ballin*, 144 U.S. 1, 7 (1892). By contrast, States are *separate sovereigns*, with the incentive and ability to bring litigation to protect their constitutional prerogatives.

rights that go to the heart of their institutional vitality. Moreover, as in this case, private parties' claims that their government has been "commandeered" will often raise difficult questions of Article III redressability: unlike cases where a governmental plaintiff official maintains it would not enforce a law absent federal pressure, in private party-initiated cases, federal courts would be required to determine the "likelihood" the State would enforce its law in the absence of federal "compulsion" – and theoretically could be asked to overrule representations of State authorities on that question (or resolve disputes between branches of State governments). Under petitioner's rule, private parties would enlist federal courts – in the name of the Tenth Amendment! – to enjoin States from enforcing State laws that violate no constitutional limitation applicable to the State's government. Such an inquiry itself would amount to an extraordinary intrusion on State prerogatives.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

Stephen P. Medeiros,

Petitioner,

v.

W. Michael Sullivan, Director of the Rhode Island Department of Environmental Management, Atlantic States Marine Fisheries Commission, and United States of America.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONER

Respondents' arguments against certiorari rest on the premise that petitioner's only interest in his Tenth Amendment claim is in securing the repeal of the state Regulation prohibiting him from catching more than one hundred lobsters per day. They contend that three conclusions follow from that premise: (i) that petitioner has no redressable injury for Article III purposes (because the State may simply leave the Regulation in place even if petitioner wins this suit); (ii) that the circuit conflict presented by the petition is narrow (because few cases in other circuits address federal statutes that operate upon states rather than individuals); and (iii) that the holding below is correct on the merits (because only the State, not petitioner, has a direct interest in the outcome).

But this case is not about the 101st lobster. To be sure, petitioner is injured by the limits on his catch; criminal charges were even brought against him for violating the Regulation. But the Tenth Amendment, and petitioner's claim, are about much more than that. By unconstitutionally rendering futile petitioner's attempts to get Rhode Island to rescind the Regulation, the federal scheme that compelled Rhode Island to implement Regulation 15.18 interferes with petitioner's interest in responsive and accountable governance. See Pet. 28. Petitioner thus attempts to vindicate the promise of the Tenth Amendment – *viz.*, that when a regulatory matter is reserved to the states, impermissible federal coercion cannot interfere with the states' ability to regulate in accordance with the views of the local electorate.

Once the false premise of respondents' argument is exposed, the bases for their opposition to the petition fall as well. Petitioner has Article III standing wholly independent of the prospect of the repeal of Regulation 15.18 because the Tenth Amendment safeguards petitioner's right to participate in a state political process unimpeded by unconstitutional federal interference. Invalidation of the federal mandate would immediately redress this constitutional injury. With respect

to the circuit split, this case is indistinguishable from decisions of other courts of appeals recognizing Tenth Amendment standing. And with respect to the merits, there is no basis in law or logic for holding that petitioner lacks standing to vindicate an individual right merely because it resides in the Tenth Amendment. Certiorari should be granted.

I. Respondents' Invocation of Article III Standing Principles Lacks Merit.

Respondents contend that petitioner's suit would inevitably be dismissed on Article III standing grounds even if he had the right as a private party to assert his Tenth Amendment claim. In particular, they maintain that petitioner suffers no redressable injury because, even if the federal statute is invalidated, it is unlikely that Rhode Island would permit him to catch more than one hundred lobsters per day.

a. There are two preliminary answers to respondents' invocation of Article III. Most obviously, that question is not before this Court. The question presented, and the only issue decided by the court of appeals, is whether there is a categorical standing bar wholly separate from Article III against a private party raising a claim under the Tenth Amendment. The question presented is not whether petitioner is the correct private party to do so or whether a private party has standing to challenge this particular regulation.

The Sullivan respondents – but notably not the Solicitor General – assert that because a court has no power to consider the *merits* of a suit without first determining that Article III is satisfied, this Court *must* decide the Article III issue. Sullivan BIO 17 (citing *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998)). This case does not implicate that rule; the only question before this Court is the threshold issue of standing under the Tenth Amendment.

A court may address such alternative standing issues without first finding Article III standing. Such a determination does not implicate the court's power to adjudicate a dispute, and the court always has jurisdiction to determine its

own jurisdiction. See *Kowalski* v. *Tesmer*, 543 U.S. 125, 128-29 (2004) (avowedly addressing third-party standing without first determining whether Article III standing requirements had been satisfied). If this Court reverses the court of appeals' erroneous Tenth Amendment standing holding, it will presumably remand the case for application of the traditional Article III considerations.

The second preliminary answer to respondents' argument is that it is in any event not a basis for denying certiorari. As discussed *infra*, respondents acknowledge that both the Seventh and Eleventh Circuits have explicitly held – in conflict with the First and Tenth Circuits – that private parties have standing to raise the sub-category of Tenth Amendment claims that involves "commandeering." Even if this Court were to go beyond the question presented and hold that private parties lack Article III standing to raise commandeering claims, the Court would still as a practical matter end the national disuniformity that now exists with respect to private parties' ability to bring such claims.

b. Separately, there is no merit to respondents' Article III standing argument. Respondents assert that, if petitioner prevailed, Rhode Island would not permit him to catch more than one hundred lobsters a day. But that is not the only cognizable injury for which petitioner seeks redress. The Tenth Amendment also protects petitioner's concrete interest in participating in the political process to secure the repeal of Regulation 15.18. See *supra* at 1; Pet. 28.

Petitioner has been in the past and will remain an activist on that question. The United States recognizes (at 4) that opposition to the 100/500 rule in Rhode Island has been led by "private citizens (primarily representing fishing interests)." Petitioner is a leader in that effort as an active member of the Rhode Island Inshore Fishermen's Association, a group of otter trawlers that has been very active in efforts to change the 100/500 Rule. If petitioner prevails on his claim, he will regain the opportunity to work to persuade the State to lift the

100/500 rule in a political environment in which all change is not effectively precluded by a federal mandate.

This Court's precedents establish that petitioner has standing. As a leading treatise recognizes, this Court has repeatedly found standing in analogous circumstances based not on "deprivation with respect to already identified property, but [on] deprivation *of the opportunity to persuade others*." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 430 (3d ed. 2000) (emphasis in original). See also Pet. 28; *Northeastern Fla. Chapter of Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656, 664-66 (1993) (collecting authorities and holding that plaintiff need only allege a deprivation "resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (holding that plaintiff had standing on the basis of his inability to compete on equal terms notwithstanding his inability to prove that he would achieve admission to medical school).

Respondents' arguments only reinforce this basis for petitioner's standing. The United States argues: "If petitioner believes that state officials are eschewing their responsibilities and should not enforce the 100/500 rule, *his recourse lies in the State's internal mechanisms of accountability*." U.S. BIO 16 (emphasis added). That is petitioner's point: the federal mandate distorts the State's political process and thereby undermines political accountability. See *New York* v. *United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.").

The Sullivan respondents assert (at 13) that "both ASMFC and the State here are independent actors, who have unfettered discretion to exercise their policy judgment concerning the management of fisheries in State jurisdictional waters" (quotation marks omitted). That false claim simply highlights petitioner's constitutionally protected interest in

seeking to effect a change in the Regulation. Under the federal scheme at issue here, the State is *not* genuinely free to adopt its own policies when the necessary consequence would be the destruction of the state's lobster industry.

c. In any event, even if the only question is whether, absent federal coercion, the State would lift the 100/500 rule, it is still fair to conclude that petitioner has Article III standing. Respondents note that Rhode Island initially supported Amendment 3 to the Lobster Management Plan and that Amendment 4, which would have allowed states to substitute measures having equivalent conservation benefits for the 100/500 rule, was subsequently tabled. U.S. BIO 4; Sullivan BIO 6, 9. But although Rhode Island initially supported Amendment 3, the more relevant point is that it later refused to follow it. The State reversed itself once again only when the federal government announced that it would impose a moratorium on lobster harvesting. Moreover, respondents fail to acknowledge that Rhode Island not only proposed Amendment 4 but also voted for the Amendment and opposed its tabling. See Proceedings of ASMFC American Lobster Management Board (Jan. 12-13, 1999); Proceedings of ASMFC Lobster Management Board (Oct. 16, 2001). The record – as opposed to respondents' mere litigating position – strongly supports the conclusion that the State opposes the 100/500 rule and would change it if given the opportunity.

The assertion of the United States (at 10) that "[t]he State has repeatedly explained" that it would not repeal the 100/500 rule – citing only multiple page references in the Sullivan respondents' court of appeals brief – is a dramatic overstatement. The Sullivan respondents do not purport to speak for the Governor or the legislature; rather they are advancing the litigating position of a single state official. Moreover, their argument (at 11) is merely that the State is *compelled* as a matter of state law to adopt and follow Regulation 15.18 wholly independent of the federal mandate petitioner challenges. But that is obviously wrong: the Sullivan respondents elsewhere admit (at 8) that "the RIMFC rescinded [the]

regulation [implementing Amendment 3] in June 2000," with the consequence that "the State was no longer in compliance with an essential element of a Commission plan." Indeed, the federal mandate that petitioner challenges in this case was adopted precisely because states were not complying with the prior voluntary scheme. See U.S. BIO 2 and Sullivan BIO 4 (both acknowledging that "inconsistent implementation" of the Compact led Congress to adopt the current scheme).[1]

Respondents' standing arguments are thus not before the Court, not a basis for denying certiorari, and meritless.

II. Certiorari Should Be Granted to Resolve the Acknowledged Conflict in the Circuits.

The Sullivan respondents frankly acknowledged in their brief below that "federal circuits are split on the issue" of private-party "standing to bring a Tenth Amendment challenge unless aligned with the state." C.A. Br. 29. In this Court, they make another series of telling admissions. They ac-

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[1] Respondents' representation (U.S. BIO 4; Sullivan BIO 8) that the designee of the Director of the DEM and the Governor opposed the refusal to comply with Amendment 3 is quite misleading: they opposed it not on the merits but because they knew, given the federal mandate that petitioner challenges here, that it would lead to a devastating moratorium and would undermine any attempt to repeal Amendment 3. As the Director of the DEM wrote to the relevant federal officials: "We *remain convinced*, however, that the regulation is inappropriate for application in Rhode Island Waters." Pet. App. 59a (emphasis added). See also, *e.g.*, Pet. App. 59a; Declaration of a Moratorium, 66 Fed. Reg. 13,443 (Mar. 6, 2001) (DEM capitulated because otherwise "the welfare of a significant portion of the state's commercial fishing industry and their families * * * would be jeopardized"); Comments of DEM Chairman Malcolm Grant at Nov. 28, 2000 RIMFC Meeting ("modifications to the non-trap provision are being pursued through Amendment 4 and the probability of succeeding would be enhanced through compliance" and that "the largest and most valuable fishery in Rhode Island employing thousands of individuals, is at risk of closure").

knowledge (at 23) that the Seventh Circuit in *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 703 (CA7 1999), "did embrace private party standing," in response to a claim of Tenth Amendment "commandeering," and specifically concluded "that this Court's discussion in *Tennessee Electric* was mere dictum." They also admit (at 20) that "the Eleventh Circuit has thrice held that private parties do have standing to assert Tenth Amendment claims," including with respect to a "commandeering" claim.

Respondents principally contend that this case implicates a conflict only with respect to these commandeering cases. U.S. BIO 17-18; Sullivan BIO 20. Even if that were so, the split would be clear. The fact that two circuits have reached the opposite result on this important question is a strong basis for certiorari. And that fact moreover establishes that neither circuit would be free in a later case to adopt respondents' view that private-party standing is precluded in commandeering cases. This Court's review is accordingly warranted.

In any event, respondents' distinction between Tenth Amendment commandeering cases and "enumerated powers" cases is illusory. Legally, *none* of the cases addressing the question presented (including the decision below) has ever found the difference relevant. The courts' rules are instead categorical – plaintiffs either may or may not raise claims under the Tenth Amendment. The assertion of the United States (at 17) that "those circuits upheld private parties' standing to bring *some* Tenth Amendment challenges" (emphasis added) is thus pure invention. This Court's precedents, in turn, reject any such distinction. In *New York* v. *United States*, 505 U.S. 144 (1992), the Court explained that commandeering and enumerated powers cases "are mirror images of each other." *Id.* at 156. Contra Sullivan BIO 21 (maintaining that *New York* supports the distinction). For its part, the United States moreover relies principally on *TVA*, which it admits "did not involve a commandeering challenge." U.S. BIO 9 n.2.

Factually, this case illustrates why it is a mistake to conclude that "commandeering" cases only involve a burden on state officials. The federal mandate not only commandeers the Rhode Island legislature, but it also upsets the federal-state balance and diminishes political accountability by interfering with petitioner's ability to seek redress from Regulation 15.18 in the legislature. See *New York*, 505 U.S. at 169. In other words, the federal scheme injures both petitioner's ability, protected by the Tenth Amendment, to participate in the state political process and his economic well-being.

Respondents' remaining attempts to distinguish the conflicting case law are weak. The Sullivan respondents maintain (at 23) that *Gillespie* "more closely resembled a conventional 'enumerated powers' challenge" because the statute "directly regulated the plaintiff," who was precluded under federal law from carrying a firearm. But the plaintiff in *Gillespie* raised – and the Seventh Circuit held that he had standing to maintain – two distinct Tenth Amendment claims: (1) an argument that the Gun Control Act's federal firearms ban exceeded Congress's authority under the Commerce Clause (185 F.3d at 704); and (2) an explicit commandeering claim arguing that the federal ban effectively commandeered state and local governments by precluding them from hiring people in his position (*id.* at 707-08).

Respondents separately rely (see U.S. BIO 21; Sullivan BIO 21) on the fact that some members of the Eleventh Circuit have briefly noted "doubts" about the correctness of that court's precedent. More relevant, however, is that the Eleventh Circuit has applied its rule on three separate occasions, never wavering. It is by this point perfectly clear that the court of appeals will not reverse itself en banc. Any doubts, moreover, are rooted in a single sentence of this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority (TVA)*, 306 U.S. 118 (1939), that only this Court can resolve. See *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 n.1 (CA11 2000) (Barkett, J., concurring specially) (expressing concern on the basis of *TVA*).

III. The Decision Below Is Wrong on the Merits.

Petitioner is entitled to "assert[] his own rights" under the Tenth Amendment. *Gillespie*, 185 F.3d at 703. As this Court explained in *New York*, the Tenth Amendment seeks to ensure "the accountability of both state and federal officials." 505 U.S. at 168. The Constitution does not divide authority between the federal government and the States "for the benefits of the States or state governments as abstract political entities." *Id.* at 181. Instead, "[t]he separation of the two spheres is one of the Constitution's structural protections of liberty." *Printz* v. *United States*, 521 U.S. 898, 921 (1997). By reserving nondelegated powers to the States and the people, the Tenth Amendment helps to ensure that federal power will not be extended at the expense of individual liberty.

Respondents' claim that private-party standing would "offend principles of State autonomy, dignity, and independence" (Sullivan BIO 22) is groundless. Private-party standing helps invigorates our system of dual sovereignty by assuring that states do not acquiesce in federal encroachments or conspire with the federal government to circumvent the Tenth Amendment. As this Court noted in *New York*, "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. * * * [I]t is likely to be in the political interest of each individual official to avoid being held accountable to the voters for [an unpopular decision]." 505 U.S. at 182. States may be especially likely to capitulate to federal incursions in a case like this one, in which the coercive federal statute imposes its most severe burdens on a relatively narrow subset of the State's citizens and affects state finances only indirectly.

The Court's decision in *TVA* does not require a different result. Respondents and the First Circuit place far too much weight on a single ambiguous and cryptic line in that outdated precedent. See *Gillespie*, 185 F.3d at 700 (describing the Court's comment about private-party standing in *TVA* as an "observ[ation] in passing"). The Court in *TVA* stated that

"there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing *in this suit* to raise any question under the amendment." 306 U.S. at 144 (emphasis added). That passing reference to private-party standing came after the Court established that the utilities lacked a "legal right" to be free from government-sponsored competition. *Id.* at 137. Consequently, the most sensible reading of the Court's statement is that the private plaintiffs in *TVA* would not have had standing even if the states had objected because, as the Court had already determined, their claim was not based on a legal right. However, the sort of "legal interest" test employed in *TVA* has long since been abandoned by this Court and replaced with a more forgiving "zone of interest" requirement. See, *e.g.*, *Ass'n of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970).

Respondents fail in their attempt (Sullivan BIO 24) to show that the rule of *TVA* "is supported by this Court's more recent jurisprudence concerning the proper role of the federal courts." The Court has never subsequently cited *TVA* for its statement on private-party standing. Moreover, the Court's recent Tenth Amendment jurisprudence supersedes any assumptions in *TVA* about the nature of that provision. The Court in *New York* explained in unmistakable terms that the Tenth Amendment protects individuals as well as states. 505 U.S. at 181-82. That understanding of the Tenth Amendment defeats respondents' assertion that petitioner is impermissibly invoking the interests of third parties. It also leads to the conclusion that as long as individuals satisfy the usual standing requirements of Article III, there should be no bar to pursuing their Tenth Amendment claims.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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